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No. 90-1279

In The

Supreme Court of the United States

October Term, 1990

MYRA JO COLLINS,

Petitioner,

v.

THE CITY OF HARKER HEIGHTS, TEXAS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Estate of a deceased municipal employee states a claim for relief, pursuant to 42 U.S.C. Section 1983, against the Municipality that employed Decedent when the Estate alleges all the elements of a Section 1983 claim including: (1) knowing and deliberately indifferent action "under color of state law" and the Municipality's deliberately indifferent policy or custom of failing to train or warn, and properly to equip or supervise its employees, including Decedent, in relation to grave life threatening risks the Municipality knows they will encounter; (2) deprivation of a constitutionally protected interest; and (3) a direct causal link between both the action under color of state law *and* the municipal policy or custom *and* the constitutional deprivation?

2. Whether "abuse of governmental authority" is an additional element of a Section 1983 claim, and if so whether that element can ever be established by a municipal employee whose injuries are alleged to have occurred, in the course of his employment, as a result of the Municipality's knowing and deliberately indifferent action and its policy or custom of deliberate indifference to Decedent's due process rights to life, liberty and personal security?

3. Whether the Estate of a municipal employee who is killed in the course of his employment because of his employer's knowing and deliberately indifferent actions and its policy or custom of deliberate indifference to his life, liberty or personal security can assert a due process claim arising directly under the Fourteenth Amendment?

4. Whether the Texas Hazard Communication Act, which requires all Texas employers (including municipalities) to inform and train employees, and their supervisors, whose work involves contact with hazardous chemicals concerning

QUESTIONS PRESENTED FOR REVIEW – Continued

workplace safety and to provide appropriate personal protective equipment, creates a life or liberty interest or "entitlement" to be free from the very workplace hazards to which Decedent succumbed, that is protected by the Due Process Clause and is enforceable pursuant to Section 1983?

PARTIES TO THE PROCEEDINGS

Counsel of record certify that the following listed persons have a direct interest in the instant case:

!. MYRA JO COLLINS, Petitioner, who was Plaintiff-Appellant below;

2. CITY OF HARKER HEIGHTS, TEXAS, Respondent, who was Defendant-Appellee below.

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OPINIONS BELOW

The October 30, 1989 Order of the United States District Court for the Western District of Texas granting Defendant-Respondent's Motion to Dismiss is not published. It is reprinted in the Joint Appendix at 29-31. The District Court's October 31, 1989 Judgment of Dismissal is not published. It is reprinted in the Joint Appendix at 32.

The November 2, 1990 decision of the United States Court of Appeals for the Fifth Circuit, affirming the dismissal, is published at 916 F.2d 284. It is reprinted in the Joint Appendix at 43-55 and its Judgment of Affirmance is reprinted in the Joint Appendix at 56.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 2, 1990. The Petition for Writ of Certiorari was docketed on February 4, 1991, and was granted on April 15, 1991. This Court's jurisdiction to review the Judgment of the Fifth Circuit is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of: (1) *Section 1 of the Fourteenth Amendment* to the Constitution of the United States, (2) *Section 1983*, Title 42 U.S.C. and (3) *Rule 12(b)*, Federal Rules of Civil Procedure are included in the Appendix hereto at A-1 to A-2.

The *Texas Hazard Communication Act*, Texas Health and Safety Code Ann., Sections 502.001 *et seq.*, (Vernon, 1991 pocket part), and Regulations as they existed in October of 1988, Texas Administrative Code, Sections 295.1-295.9 (West, 1991), are included in the Appendix hereto at A-3 to A-33 (hereinafter Br. App.). (Citations to the Act and Regulations are provided in Point IV *infra* to the version in the Br. App. and to the extent possible, the current codified version).

STATEMENT OF THE CASE

Petitioner, Myra Jo Collins ("Collins"), Plaintiff and Appellant below, filed and served her Complaint on June 14, 1989. She alleged under 42 U.S.C. Section 1983, that her deceased husband, Larry Michael Collins ("the decedent"), was an employee of the Sanitation and Sewer Department ("Sewer Department") of the Respondent, the City of Harker Heights, Texas ("the City"), a Texas Municipal Corporation, which was Defendant and Appellee below.

Collins' Complaint alleges the following facts, which must be accepted as true when considering a motion to dismiss pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure.

(1) The City is a Texas Municipal Corporation. Complaint p. 2, ¶2 (Record at 7, Jt. App. at 5).

(2) In July 1988 the decedent began working for the City in its Sanitation and Sewer Department. His job responsibilities included entering sewer mains through manholes to investigate sewer line problems. Complaint pp. 2-3, ¶¶4-7 (Record at 6-7, Jt. App. at 5). Such work can be hazardous to life and personal security because of the sewer gases that accumulate in the lines. Complaint p. 3, ¶10 (Record at p. 6, Jt. App. at 5).

(3) The City required decedent to work in the sewer lines as part of his job, but provided the decedent no safety training. Complaint p. 3, ¶5 (Record at 6, Jt. App. at 5). No warnings or instructions were ever communicated or posted to alert him or other employees as to the grave hazards involved in entering the sewer lines; nor were he or other employees instructed on how to protect themselves against these hazards. Complaint p. 3, ¶6-7 (Record at 6, Jt. App. at 5). Although the City owned minimal safety equipment, including air blowers and safety ropes, Complaint p. 3, ¶8 (Record at 6, Jt. App. at 5), other rudimentary equipment, including gas detector meters, was lacking altogether. Complaint p. 3, ¶9 (Record at 6, Jt. App. at 5). Further, the City's Sewer Department employees, including decedent, were not trained or instructed

on how to use the available equipment, advised of its importance, nor required or advised to use it. Complaint p. 5, ¶1 (Record at 4, Jt. App. at 7); Complaint p. 3, ¶8 (Record at 6, Jt. App. at 5). The City's supervisors also were not instructed or required to use or have employees, including decedent, use safety equipment or measures. *Ibid.*

(4) The City through its supervisors was aware of the dangers to Sewer Department employees posed by the accumulation of gases in sewer lines. Complaint p. 3, ¶10 (Record at 3, Jt. App. at 5). Several months before the decedent was killed, his supervisor had been rendered unconscious by sewer gas while in a manhole. Complaint p. 5, ¶2 (Record at 4, Jt. App. at 7).

(5) The City's failure to train or warn and properly to equip disregarded the express and mandatory provisions of the State of Texas' Hazard Communication Act, which applies to municipal workers. Complaint p. 4, ¶¶14-19 (Record at 5, Jt. App. at 6).

(6) On October 21, 1988, as required by the City as part of his job, decedent entered a manhole to try to unstop a clogged sewer line. Decedent entered the 18 foot deep manhole as directed without harness, respirator, air blower, gas detector meter or any other safety device. He lost consciousness, and died of asphyxia due to suffocation (oxygen deprivation) before he could be removed. Complaint pp. 3-4, ¶¶11-13 (Record at 5-6, Jt. App. at 6).

(7) Finally, in concluding Paragraphs the Complaint specifically alleged violations of decedent's constitutional rights due to the City's deliberately indifferent actions and policy and custom as follows:

> 1. Prior to October, 1988, *the custom, policy and procedure* of the City of Harker Heights, Texas was not to train new employees of the dangers of working in sewer lines and manholes. Furthermore, there was a *custom* to not take any safety equipment to the job site when a manhole or sewer line was to be entered, or if some was taken, it was not used.
>
> 2. Prior to October, 1988, the City of Harker Heights *was on notice of the dangers* to which the

employees were exposed because Larry Michael Collins' supervisor had been rendered unconscious in a manhole several months prior to October, 1988, in fact, several months before Larry Michael Collins began work at the City of Harker Heights.

Furthermore, *the Hazardous Communications Act* became effective January, 1986, which *imposed a burden on the City* of Harker Heights to train new employees regarding the dangers of entering a sewer line, to provide the necessary safety equipment and to train the supervisors and employees about its use.

3. There was a *custom and policy* to not post any type of safety warnings or signs concerning the dangers of entering sewer lines and the dangers of not utilizing their safety equipment.

4. Larry Michael Collins had a *constitutional right to be free from unreasonable risks of harm to his body, mind and emotions and a constitutional right to be protected from the City of Harker Heights' custom and policy of deliberate indifference toward the safety of its employees.*

5. *The need for the training of these employees and the acquisition and use of safety equipment is so obvious, especially in light of the Texas Hazardous Communication Act and by such it was so obvious that such a custom and policy resulted in such an inadequacy that it would result in the violation of an employee's constitutional rights* – the right to be free from harm and injury resulting in death.

* * *

Causal Connection

The City of Harker Heights' *policy and procedure* not to train newly hired personnel in the sewer department before they were placed in underground sewer lines and manholes, their [sic] *policy and procedure* to not train employees in the use of proper safety equipment required by the State law and *policy and custom* not to require the safety

equipment to be on hand or used at the job site *were all the cause of the death and deprivation of the constitutional rights of Larry Michael Collins.*

Complaint pp. 5-7 (Record at 2-4, Jt. App. at 7-8) (emphasis added).

STATEMENT OF PROCEEDINGS BELOW

On July 7, 1989, the City filed a motion to dismiss Collins' Complaint, pursuant to Rule 12(b)(6), Fed. R. Civ. P., for her purported failure to state a claim upon which relief could be granted. (Jt. App. at 10). Collins filed her Response to the City's motion to dismiss on August 24, 1989 (Jt. App. at 20); the City filed its Reply on August 30, 1989 (Jt. App. at 25).

Without hearing or oral argument, on October 30, 1989, the District Court entered an Order granting the Motion. (Jt. App. at 29). The court's summarily stated reason for dismissal was that "even deliberate exposure of a public employee to a 'high risk' does not violate the constitution because it is not an abuse of governmental power" and the acts of "Defendant's superintendent as alleged by the Plaintiff do not amount to a deliberate indifference as to a constitutionally protected right." (Jt. App. at 31).

On October 31, 1989, Collins filed a Supplemental Brief in opposition to the City's motion to dismiss. (Jt. App. at 33). Judgement was entered on October 31, 1989. (Jt. App. at 32). Collins filed her timely Notice of Appeal on November 16, 1989. (Jt. App. at 42).

On November 2, 1990 the Fifth Circuit affirmed the judgment of dismissal, expressly on the sole ground that "pursuant to controlling Fifth Circuit precedent, because an abuse of government power is not implicated, a § 1983 action will not lie." 916 F.2d at 285 (Jt. App. at 43). The Fifth Circuit acknowledged that in her complaint Collins "makes the requisite *Monell* [*v. Department of Social Services*, 436 U.S. 658 (1978)] and *City of Canton*, [*Ohio v. Harris*, 489 U.S. 378 (1989)] allegations charging that the City's 'custom and policy of deliberate indifference to the safety of its

employees' violated the constitutional rights of her deceased husband." 916 F.2d at 287 (Jt. App. at 48).

The Fifth Circuit also acknowledged that for purposes of a Rule 12(b)(6) motion, although not plead expressly: "an abuse of government power . . . [or] that the City's conduct was of a unique governmental character . . . was pleaded sufficiently." 916 F.2d at 290 n.7, (Jt. App. at 53 n.7). (In fact, under Texas statute, sewer work is exclusively a governmental function. *See* Texas Civil Practice and Remedies Code, Section 101.0215 (Vernon 1991).)

The Fifth Circuit affirmed because in its view this Court's holding in *Harris*:

> establishes only the degree of fault that must be alleged and proved in § 1983 actions against a municipality in certain failure to train cases; it does not hold that all such cases alleging the requisite causation lie under § 1983. *In this Circuit, there is a separate standard that must also be satisfied – an abuse of government power*. While this element is in many ways similar to, and often blends with, other necessary elements for a § 1983 action, such as deprivation of a constitutional right, and springs from the same sources as the deprivation element, it is separate nonetheless.
>
> 916 F.2d at 287 (Jt. App. at 47-48) (emphasis added). *See also* 916 F.2d at 290 n.7 (Jt. App. at 53 n.7).

In reaching its decision the Fifth Circuit specifically recognized that its decision and holding, and the other Fifth Circuit decisions upon which it relied, were in sharp conflict with a recent decision of the United States Court of Appeals for the Eighth Circuit, *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1989). *See* 916 F.2d at 290-291 (Jt. App. at 53-55). In *Ruge*, the Eighth Circuit had reversed a district court Order sustaining a Rule 12(b)(6) Motion to dismiss a Section 1983 "failure to train" case, by the estate of a municipal sewer worker against his municipal employer, the facts of which were very similar to those alleged in the Complaint here.

In the instant case, the Fifth Circuit determined that:

> The question presented in this case is whether a plaintiff seeking recovery under Section 1983 for injury to a government employee must demonstrate, inter alia, that the conduct in issue was an abuse of governmental power. *More particularly, does alleged wrongful conduct by government – in its capacity as employer rather than as a governing authority – that deprives its employee of an alleged constitutional right give rise to a Section 1983 action*? We base our holding on the abuse of government power standard, separate from the constitutional deprivation element or standard.
>
> 916 F.2d at 286 (Jt. App. at 45) (emphasis added). *See also* 916 F.2d at 287 (Jt. App. at 48).

Addressing that question, the Fifth Circuit held that even though Collins adequately alleged "abuse of government power" by "conduct that was of a unique governmental character," 916 F.2d at 290 n.7 (Jt. App. at 53 n.7) she could and had

> ' . . . made out at most the abuse of power which any private employer might be guilty, *not the abuse of any particular authority or obligation held by the government*'; that the injury must 'be attributed to a misuse of power made possible only because the City is clothed with authority of state law.'
>
> 916 F.2d at 288 (Jt. App. at 55) (emphasis in original), quoting *Rankin v. City of Wichita Falls*, 762 F.2d 444, 447, 449 (5th Cir. 1985).

The Fifth Circuit did not reach the issue "whether there was a deprivation of a constitutional right" enjoyed by decedent in the nature of a substantive due process right arising directly out of the Fourteenth Amendment as a life and liberty interest. 916 F.2d at 287 (Jt. App. at 48); 916 F.2d at 289 n.6 (Jt. App. at 51 n.6).

This question was reached by the Eighth Circuit in *Ruge* and decided in favor of plaintiff. *See* 892 F.2d at 738. The Eighth Circuit took the position that in such circumstances any "abuse of government power" component of a Section 1983 claim merges into the causation and federally protected rights components:

> Thus, where the state abuses its governmental power through an alleged policy of actively placing a person into a situation of known danger the Constitution proscribes and limits such action.
>
> *Ruge*, 892 F.2d at 741.

> The death of [a municipal employee] while working for the City does not, in itself, violate the constitution. The constitutional violation occurs when his death is caused by an inadequate municipal policy, adopted with its requisite culpability. It is then that an abuse of government authority arises sufficient to state a cause of action under Section 1983.
>
> *Ruge*, 892 F.2d at 741 n.6.

The Fifth Circuit also did not reach the question whether the Texas Hazard Communication Act (Br. App. at A-3 to A-17) conferred upon decedent an entitlement to be provided with safety training and measures by his municipal employer that creates a due process interest. The Fifth Circuit acknowledged that, unlike *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 195, n.2 (1989), this issue was properly raised below in the Complaint, and in the briefs and arguments before it. 916 F.2d at 287, n.3 (Jt. App. at 48-49, n.3).

SUMMARY OF ARGUMENT

I.

Collins properly alleged all elements and requisites of a Section 1983 claim. She alleged that the City failed to train or warn its Sewer Department employees (including decedent) and its supervisors concerning grave life threatening workplace hazards, to inform them of workplace safety measures or to provide them with safety equipment even though the City owned some but not all appropriate equipment. Yet, through its Sewer Department supervisors, the City knew of the serious dangers to life and personal security, due to the accumulation of sewer gas, encountered by employees who worked in sewer lines. Collins further alleged that such safety measures, training and equipment were expressly mandated

by the Texas Hazard Communication Act. Nevertheless the City, knowing of the risks to decedent and with deliberate indifference to the danger to decedent, required decedent as part of his job to enter its sewer lines without training or warning him at all about the danger, or providing him with adequate equipment or supervision. She alleged further that the City's actions both resulted from *and* manifested its policy or custom of deliberate indifference to grave safety hazards to its Sewer Department employees' lives and personal security as protected directly by the Due Process Clause of the Fourteenth Amendment, and pursuant to a state-created life and liberty entitlement to protection from the very hazards to which the decedent succumbed. Finally, she alleged that the City's deliberately indifferent actions and policy and custom directly and proximately caused decedent's death.

These allegations establish the only two elements required for a Section 1983 claim: (1) that someone deprived decedent of a federal right and (2) the deprivation was under color of State law. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). *See also DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989).

The actions complained of are those of the City itself, and necessarily were "under color of state law." The federal rights involved are due process rights arising directly under the Fourteenth Amendment to the Constitution, *e.g.*, *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1978); *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1990), and due process rights consisting of life and liberty (personal security) interests created by the Texas Hazard Communications Act. *E.g.*, *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989); *Board of Regents v. Roth*, 408 U.S. 654 (1972); *Meador v. Cabinet for Human Resources*, 902 F.2d 474 (6th Cir.), *cert. denied* 112 L.Ed.2d 145 (1990).

The allegations in the Complaint also establish that the City and its supervisors acted with knowing deliberate indifference to the risks to decedent's life and personal security, *e.g.*, *Daniels v. Williams*, 474 U.S. 327 (1986), pursuant to the City's deliberately indifferent municipal policy or custom of not training and warning and not properly equipping and

supervising its sewer workers, including decedent, in relation to the risks to which decedent succumbed. *E.g., City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989); *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1990). Further, the City's deliberately indifferent actions and policy or custom were direct and proximate causes of decedent's injuries. *E.g., Harris, supra; DeShaney, supra; Ruge, supra.*

By recognizing that Collins properly has asserted a Section 1983 claim this Court would *not* make Section 1983 a "font for tort law." *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 808 (1982) (describing pre-trial measures for disposing of non-meritorious section 1983 complaints). Recognizing such a claim is also wholly consistent with the broad remedial purposes of Section 1983. *See, e.g., Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

II.

No additional "abuse of government power" element is necessary under Section 1983. Abuse of government power necessarily inheres in the "under color of state law," federal right, and standard of liability components of a Section 1983 claim. If those components of the Section 1983 claim are satisfied, necessarily there has been an abuse of government power. *See, e.g., Ruge v. City of Bellevue*, 892 U.S. 738, 741 (and n.6) (8th Cir. 1989); *Yeksigian v. Nappi*, 900 F.2d 101 (7th Cir. 1990); *Cornelius v. Town of Highland Lake, Alabama*, 880 F.2d 348, 355 (11th Cir. 1989), *cert. denied sub nom. Spears v. Cornelius*, ___ U S. ___, 108 L.Ed.2d 785 (1990). *See also City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989).

This Court's decisions in *Daniels* and *Harris*, and other cases, refer to abuse of government power only to explain why mere negligence is not the standard of care for determining liability for injuries to due process rights to life or liberty (personal security) (*Daniels*) and why a municipality is liable for such injuries due to a "failure to train" *only* when the injury is "caused" by the municipality (*Harris*).

The allegations of the Collins Complaint satisfy the requirements of *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989) that decedent's federal rights were violated by action of the City and not by the action of an intervening private actor. *Accord Stoneking v. Bradford School District*, 882 F.2d 720, 724-725 (3rd Cir. 1989), *cert. denied* 107 L.Ed.2d 835 (1990).

III.

Section 1983 liability of a municipality, acting as employer, for violating its employees' federal rights was clearly established by the Court in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), a suit brought by municipal employees against their employer. As this Court held, Section 1983 "was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." 436 U.S. at 701.

Public employees' constitutional rights within the employment relation are protected under Section 1983 from invasion by the public employer, even though the rights of employees of private entities are not similarly protected. *E.g., O'Connor v. Ortega*, 480 U.S. 709 (1987). Among the rights so protected are public employees' First Amendment expressive and religious freedoms, procedural due process of law, the equal protection of the laws, Fourth Amendment protection from unreasonable searches and seizures, and the Fifth Amendment privilege against self-incrimination.

Substantive due process protection is also available to public employees from "deliberate" decisions to deprive them of their life or liberty (personal security). *Ruge*, 882 F.2d 738; *Cornelius*, 880 F.2d 348. This follows from the fact that the Due Process clause "was intended to secure the individual form the arbitrary exercise of the powers of government." *Daniels*, 474 U.S. at 331-332, citing cases.

As the Eighth Circuit correctly held in *Ruge*:

> The death of [a municipal employee] while working for the City does not in itself violate the constitution. The constitutional violation occurs when his

death is caused by an inadequate municipal policy, adopted with its requisite culpability.

892 F.2d at 741 n.6.

See Cornelius, supra. See also McClary v. O'Hare, 786 F.2d 83, 89 n.6 (2nd Cir. 1986).

Particularly in light of the City's knowledge of the risks to which it exposed decedent, and given the clear mandate of the Texas Hazard Communication Act, the City's actions are sufficiently shocking and reckless to constitute a violation of substantive due process rights. *See Daniels, supra.* Indeed, this Court's relevant decisions, for example in *Daniels* and *Harris*, and those of the Circuit Courts in *Ruge, Cornelius* and *McClary*, should be read with the *Restatement (Second) of Torts* and W. Prosser and W. P. Keeton's *Law of Torts* (5th Ed. 1984). Examined through those lenses, it is plain that as alleged here the City acted with sufficient recklessness as to have invaded decedent's substantive due process rights.

Moreover, decedent did not assume the risks to which he succumbed. *See Restatement (Second) of Torts; Restatement (Second) of Agency;* W. Prosser and W.P. Keeton, *The Law of Torts* (5th Ed. 1984). This fact renders inapposite most of the Circuit Court decisions relied upon by the Fifth Circuit, below. Those cases, by contrast with the instant case, involved injuries to policemen or custodial officers who were injured by private actors (perpetrators or escapees). *See also, DeShaney*, 489 U.S. 189. Such public servants, who accept jobs that involve known high risks, properly are presumed to have assumed such risks. By contrast, newly employed sewer workers cannot be presumed to know and accept the risks to which decedent succumbed.

IV.

The Texas Hazard Communication Act creates a life and liberty (personal security) interest that is subject to full due process protection. The Act includes substantive predicates that mandate protective action by the City. If obeyed by the City, the Act would have eliminated or ameliorated the risks to decedent. *See e.g., Kentucky Board of Corrections v. Thompson*, 490 U.S. 454 (1989); *Board of Regents v. Roth*, 408 U.S. 564 (1976). Given the risks to decedent's life resulting from the City's failure to obey the clear mandates of the Act, the City can assert no interest to justify its failure to comply. *Cf. Mathews v. Eldridge*, 424 U.S. 319 (1976).

When the state creates such a life and liberty - personal security entitlement, substantive due process protections apply against arbitrary and capricious government action. *E.g., Meador*, 902 F.2d 474; *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989). *See also, e.g., Olin v. Wakinekona*, 461 U.S. 238, 249 (1983); *Superintendent v. Hill*, 472 U.S. 485 (1985).

ARGUMENT

I. COLLINS HAS STATED A CLAIM FOR RELIEF UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND 42 U.S.C. SECTION 1983, AS SHE HAS PROPERLY ALLEGED AND MUST BE PRESUMED TO BE ABLE TO PROVE EACH AND EVERY ELEMENT OF SUCH A CLAIM.

This case presents pure questions of law. They concern the scope of the Due Process Clause of the Fourteenth Amendment and of 42 U.S.C. Section 1983.

The case has arisen in the context of a Motion to Dismiss "for failure to state a claim upon which relief can be granted" under Rule 12(b)(6), Fed.R.Civ.P. As recognized by the courts below, when considering a Rule 12(b)(6) Motion, a court must construe the Complaint liberally in plaintiff's favor; all facts well stated in the Complaint must be taken as true; and the action may be dismissed only if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

The Complaint in this case must also be evaluated with due deference to this Court's repeated recognition that Section 1983 is a broadly stated remedial statute. It should be

construed generously to facilitate rights in the absence of clearly stated congressional intent to the contrary. *See, e.g., Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 683-685 (1978); *Maine v. Thiboutot*, 448 U.S. 1 (1980).

In *Gomez v. Toledo*, 446 U.S. 635, 640 (1980), this Court unanimously held that "by the plain terms of § 1983," to state a claim for relief a plaintiff must allege only two things: "First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right has acted under color of state . . . law." *Ibid. See West v. Atkins*, 487 U.S. 42 (1988).

Other decisions of this Court have identified additional allegations necessary to survive a Rule 12(b)(6) motion, when the Section 1983 claim is asserted against a municipality or for invasion of the due process rights to life and the personal security component of liberty. None has added "abuse of government power" as an additional component of the Section 1983 claim.

The Complaint in this case properly alleges each and every element of a claim under 42 U.S.C. Section 1983 of deprivation by a municipality of the decedent's Due Process right to life and liberty-personal security. It therefore must survive a Rule 12(b)(6) motion. In particular, Collins adequately alleged that:

1. *Affirmative acts were performed under color of state law*. The Complaint alleges that decedent entered the sewer line in which he succumbed, at the City's direction and as a requirement of his job, and the City failed to warn or train him and properly to supervise or equip him. The City is a Texas municipal corporation, and therefore was acting under color of state law, as were its supervisors. *See, e.g., DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989); *West v. Atkins*, 487 U.S. 42 (1988); *Yeksigian v. Nappi*, 900 F.2d 101 (7th Cir. 1990); *Stoneking v. Bradford School District*, 882 F.2d 720 (3rd Cir. 1989).

2. *Both the City and its supervisors: (a) acted with knowing deliberate indifference to decedent's life, liberty-personal security and (b) pursuant to the City's own deliberately indifferent municipal policy or custom of not training or warning and properly equipping or supervising its employees with respect to the life threatening hazards involved in the tasks they were directed to perform*. The Complaint alleges: (a) that decedent's supervisor himself nearly succumbed to noxious sewer gas several months prior to decedent's death, when the supervisor had entered a sewer line without adequate equipment, and (b) that the City systematically failed to train or warn and properly equip and supervise its sewer workers, including decedent, despite its knowledge of the risks *and* the clear mandate of the Texas Hazard Communication Act.

These constitute allegations of deliberately indifferent and knowingly reckless acts toward decedent that transcend even gross negligence. *E.g., Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1989); *Cornelius v. City of Highland Lake, Alabama*, 880 F.2d 348 (11th Cir. 1989), *cert. denied sub nom. Cornelius v. Spears*, ___ U.S. ___, 108 L.Ed.2d 785 (1990). *See Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986). *See also Estelle v. Gamble*, 429 U.S. 97 (1976); *Brower v. County of Inyo*, 489 U.S. 593 (1989). They also constitute allegations of the City's custom or policy of deliberate indifference to decedent's life and liberty-personal security, in the sense that the need for "training [was] so obvious, and the inadequacy [was] so likely to result in the violation of constitutional rights, that the policy-makers of the City can reasonably have been said to have been deliberately indifferent to the need." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 390 (1989). *See Ruge, supra; Cornelius, supra. See also, e.g., Jett v. Dallas Independent School District*, 491 U.S. 701 (1989).

3. *The City's knowing deliberately indifferent acts and policy or custom directly and proximately caused decedent's injury*. The Complaint alleges that the City's knowing and deliberately indifferent acts of sending decedent into the sewer line without training and warning or adequate equipment and supervision, and the City's policy or custom of

deliberate indifference in failing to train or warn, and properly equip and supervise were the direct and proximate causes of decedent's death. *E.g., City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989); *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1989); *Cornelius v. Town of Highland Lake, Alabama*, 880 F.2d 348 (11th Cir. 1989). *See DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989); *Martinez v. California*, 444 U.S. 277 (1980). *See also Rizzo v. Goode*, 423 U.S. 369 (1976).

4. *The City's deliberately indifferent acts and policy and custom violated decedent's federally protected rights both: (a) arising directly under the Due Process Clause of the Fourteenth Amendment, and (b) consisting of a state created life and liberty-personal security interest protected by the Due Process Clause.* The Complaint alleges that decedent had a due process right arising directly under the Fourteenth Amendment, to be free from unreasonable risks to his life or personal security. *E.g., City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989); *Ingraham v. Wright*, 430 U.S. 651, 673 (1977); *Daniels v. Williams*, 474 U.S. 327 (1986); *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1989); *Cornelius v. Town of Highland Lake, Alabama*, 880 F.2d 348 (11th Cir. 1989); *Stoneking v. Bradford School District*, 882 F.2d 720 (3rd Cir. 1989). The Complaint also alleges that the Texas Hazard Communication Act also gave rise to federal due process rights, as the Act created substantive predicates and mandatorily imposed burdens on the City to train new employees regarding the dangers of entering a sewer line, to provide the necessary safety equipment and to train the supervisors and employees about its use. *E.g., Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989); *Hewitt v. Helms*, 459 U.S. 460, 472-476 (1983); *Mills v. Rogers*, 457 U.S. 291 (1982); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *Perry v. Sinderman*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Meador v. Cabinet for Human Resources*, 902 F.2d 474 (6th Cir. 1990) *cert. denied*, 112 L.Ed.2d 145 (1990); *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989).

The Fifth Circuit, in the face of the Eighth Circuit's *Ruge* decision, has held that the Complaint nevertheless was properly dismissed because Collins could not allege an "abuse of government power" that arose from the City's role as government as opposed to its role as employer. As will appear hereafter, there is no such additional element to a Section 1983 claim, and Collins has properly alleged violations by the City of his constitutional rights.

By recognizing that Collins properly has asserted a Section 1983 claim, this Court would not be allowing Section 1983 to " 'become a font of tort law to be superimposed by whatever system may already be administered by the states,' *Paul v. Davis*, 424 U.S. 693, 701." *Daniels*, 474 U.S. at 332. *See generally, e.g.*, Blackmun, *Section 1983 and Federal Protection of Individual Rights – Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. Rev. 1 (1985), in which Justice Blackmun observed of several pre-*Daniels*, *Harris* and *DeShaney* decisions:

> Whatever else may be said about these [earlier] decisions, they have made it difficult, if not impossible, for a plaintiff who has only a state-law tort claim against a state official to hale the official into federal court under the guise of a § 1983 action. The Supreme Court gives ample evidence of being able to devise protective measures for itself and other Federal Courts.

Id. at 21.

As this Court has recognized in the qualified good faith immunity context:

> Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief . . . , it should not survive a motion to dismiss. Moreover, . . . damage suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment. . . . In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure

> that . . . [municipalities] are not harassed by frivolous lawsuits.
>
> *Harlow v. Fitzgerald*, 457 U.S. 800, 808 (1982), quoting *Butz v. Economou*, 438 U.S. 478, 507-508 (1978).

At present, the Court's "protective measures" require that Collins' Section 1983 complaint and others like it must assert actions under color of state law. *E.g., DeShaney*, 489 U.S. 189. Such complaints must also assert knowing deliberate action, not mere or even gross negligence. *E.g., Daniels*, 474 U.S. 327. Such complaints must also assert a municipal policy or custom of deliberate indifference to the plaintiffs' personal security. *E.g., Harris*, 489 U.S. 378. They must assert that the policy was that of the ultimate municipal decision maker. *E.g., Jett*, 491 U.S. 701; *Praprotnick*, 485 U.S. 112. These complaints must also assert that these acts and policy or custom, rather than intervening efficient private act, caused decedent's injuries. *E.g., DeShaney*, 489 U.S. 1. *See also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (rendering the contested issue of fact basis for denying summary judgment motions more difficult to establish); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (purposes of summary judgment); Rule 11, F.R.Civ.P. (sanctions); 42 U.S.C. Section 1988 (attorney's fees); *Chambers v. Nasco, Inc.*, ___ U.S. ___, 59 U.S. L.W. 4595 (June 6, 1991) (No. 90-256) (inherent power to assess attorneys fees and related expenses for a party's bad faith conduct).

II. THERE IS NO ADDITIONAL ABUSE OF GOVERNMENT POWER ELEMENT TO MAKE OUT A SECTION 1983 CLAIM, THAT MUST BE SATISFIED BY THE ESTATE OF A MUNICIPAL EMPLOYEE WHO SUES THE MUNICIPALITY FOR WHICH HE WORKED, FOR DEPRIVATION OF FEDERALLY PROTECTED RIGHTS THAT OCCURRED IN THE COURSE OF HIS EMPLOYMENT.

The Fifth Circuit acknowledged that Collins properly alleged all the components of a Section 1983 action stated in Point I, *supra*. 916 F.2d at 287 (Jt. App. at 48). However, that

court added a new additional element to the Section 1983 claim – abuse of government authority or power – which it held plaintiff could not satisfy. 916 F.2d at 287-291 (Jt. App. at 48-55).

According to the Fifth Circuit, no claim for relief can be asserted under Section 1983 because the acts and injuries complained of here occurred within "the decedent's relationship with the City – one of employer and employee, rather than one in which the City, as government, acted against the decedent, as governed." 916 F.2d at 287 (Jt. App. at 48). Thus Collins' allegations make out "at most the abuse of power [of] which any private employer might be guilty, *not the abuse of any particular authority or obligation held by the government.*" 916 F.2d at 288 (Jt. App. at 51) (emphasis in original), quoting *Rankin v. City of Wichita Falls*, 762 F.2d 444, 447 (5th Cir. 1985).

In the instant case, the Fifth Circuit said it derived the additional "abuse of government power" element from this Court's opinions in *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989) and *Daniels v. Williams*, 474 U.S. 327 (1986). 916 F.2d at 287-288 (Jt. App. at 47-49). In fact, the Fifth Circuit was simply reaffirming its decision in *Rankin v. City of Wichita Falls*, 762 F.2d 444 (5th Cir. 1985), in which prior to *Harris* and *Daniels* it had created an additional "abuse of government power" element of the Section 1983 claim. *See* 916 F.2d at 288-289 (Jt. App. at 49-51).

Harris and *Daniels* are relevant precedents. However, contrary to the Fifth Circuit's assessment, neither *Harris* nor *Daniels* establishes a new or separate element for a Section 1983 claim. In those cases the Court referred to abuse of government power only to explain the reasons why mere negligence was *not* the standard for determining liability for violation of the substantive due process rights to life or liberty-personal security (*Daniels*) and to assure that deprivation of the federally secured right was "caused" by a municipality's "failure to train" (*Harris*). Thus, by imposing standards of deliberate misconduct in such cases the Court was guaranteeing that such claims would address only abuses of power, as opposed to mere negligent acts committed by

persons who happened to be acting under color of state law, and that the municipality's policy or custom actually "caused" the constitutional deprivation. *See Harris*, 489 U.S. at 385-392; *Daniels*, 474 U.S. at 331-336; *Davidson v. Cannon*, 474 U.S. 344 (1986). *Accord, e.g., Brower v. County of Inyo*, 489 U.S. 593 (1989); *Estelle v. Gamble*, 429 U.S. 97, 104-106 (1976). *See also Ware v. Unified School District No. 492*, 902 F.2d 815 (10th Cir. 1986) (applying the deliberate indifference standard to a First Amendment wrongful termination claim).

The Fifth Circuit also incorrectly relied on this Court's decision in *DeShaney* for its addition of an "abuse of government power" element. It adduced from *DeShaney* the proposition "that not all injuries arising out of an association or relationship with government give rise to a § 1983 claim, even if all other elements for that claim are present." 916 F.2d at 289 (Jt. App. at 51-52). According to the Fifth Circuit, government employment does not involve the kind of restraint on an individual's liberty that can give rise under *DeShaney* to a substantive due process life or liberty-personal security interest. As decedent was free to quit his job with the City, the Fifth Circuit reasoned, the City did not abuse its government power when, to decedent's peril, and with knowing deliberate indifference, the City directed him to enter the sewer line without training or warning him as to the hazard, and without providing him proper equipment or supervision, even though there is no suggestion that decedent knew of or accepted the risk. 916 F.2d at 289-91 (Jt. App. at 52-53) quoting *de Jesus Benavides v. Santos*, 883 F.2d 385 (5th Cir. 1989) (involving injury of a jail detention officer by a prisoner during an attempted escape).

The Fifth Circuit has misread *DeShaney* and misconstrued this Court's abuse of government power concept. In fact, *DeShaney* does not identify an additional abuse of government power element of Section 1983 claims; essentially it reaffirms the principles that a Section 1983 can be based only on violations of federal rights that are caused by a person actually acting under color of state law.

In *DeShaney* this Court held that no Section 1983 claim could be asserted because the harm to the abused child by his

father was imposed by the actions of a private person who was *not* acting "under color of state law." The Court also held that the Constitution is not a "font of positive protections" of people from injury by private persons.

As the Court stated in *DeShaney*:

> . . . nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion *by private actors*. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety or security. It forbids the State itself to deprive individuals of life, liberty or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text. Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing [its] power, or employing it as an instrument of oppression." *Davidson v. Cannon, supra*, at 348.
>
> 489 U.S. at 195-196 (emphasis added).

Thus, in *DeShaney*, this Court held that neither element of a Section 1983 claim was present, as no federal right had been violated and no injury was "caused" by action under color of state law. The abused child's due process rights had not been invaded by the Winnebago County Department of Social Services because the harm suffered by the child were caused by the child's father, rather than by a state actor, while the child was in the father's, not the state's, custody. Further, the Court determined that the state played no part in creating the dangers the child faced and did nothing to render the child more vulnerable to those dangers. 489 U.S. at 201-203. Thus, no person "acting under color of state law" *caused* the harm to the abused child.

By contrast, in the instant case Collins has properly alleged affirmative actions by persons acting under color of state law that directly and proximately caused decedent's

death, in violation of his Due Process rights to life, liberty and personal security. *See also Stoneking v. Bradford School District*, 882 F.2d 720, 724-725 (3rd Cir. 1989) (distinguishing *DeShaney* in this fashion). In the instant case, decedent entered the sewer line in which he died as part of his job and at the instance of the City and its supervisors. Further, the City had a deliberately indifferent policy or custom of failure to warn or train and adequately to equip or supervise. Thus his injury was caused by acts performed under color of state law, and no efficient private actor intervened. Accord *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1989); *Cornelius v. Town of Highland Lake, Alabama*, 880 F.2d 348 (11th Cir. 1989).

At bottom, the Fifth Circuit's approach to constitutional protection of public employers turns on a distinction between a municipality acting as government in relation to a person, and a municipality acting as that person's employer. Such distinctions, however, have little place in federal constitutional analysis and in defining the scope of municipal liability under Section 1983.

A municipal employee does not leave the protections of the Constitution behind when he punches the time clock and begins work. *O'Connor v. Ortega*, 480 U.S. 709 (1987). ("Individuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer"). It is simply irrelevant to the constitutional and Section 1983 analyses that the same actions in the employment setting, if performed by a private employer, would not give rise to an invasion of a constitutional right. That is, after all, what the "under color of state law" requirement of the Section 1983 claim is all about. *See West v. Atkins*, 487 U.S. 42, n.15, (1988); *O'Connor, supra; Griffin v. Maryland*, 378 U.S. 130, 135 (1964).

The Seventh Circuit got to the heart of the matter recently in *Yeksigian v. Nappi*, 900 F.2d 101 (7th Cir. 1990), a Section 1983 wrongful arrest case brought by a journeyman electrician and career employee of the City of Chicago, against his immediate supervisor and the supervisor's high management level superior, as well as the City of Chicago. Plaintiff alleged that he was arrested because his supervisor

made knowingly false statements to the Chicago police when plaintiff refused to leave his job site, by signing a complaint that plaintiff "had been suspended from his job [and] that his presence on the job was causing a safety hazard. . . . " 900 F.2d at 102-103. The district court had granted a motion to dismiss the Complaint and denied a subsequent motion to amend on the ground that the defendants had acted only as employers. 900 F.2d at 103.

Reversing the dismissal, the Seventh Circuit acknowledged and distinguished several circuit court decisions holding that an individual does not act under color of state law merely by supplying false information to an arresting officer.

> In those cases, however, a *private* party had provided the false information. By contrast, this case involves city supervisory personnel, who alleged abused their authority as city supervisory personnel, to secure without justification the arrest of an employee under their supervision at a city-owned facility. The fact that these city employees may have acted *in excess* of their authority is simply irrelevant to the color of state law inquiry. "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *United States v. Classic*, 313 U.S. 299, 326 (1941).
>
> 900 F.2d at 104 (emphasis in original).

III. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT PROTECTS THE LIVES AND PERSONAL SECURITY OF ALL PERSONS, INCLUDING MUNICIPAL EMPLOYEES, FROM INVASION BY ARBITRARY AND CAPRICIOUS ACTIONS OF MUNICIPALITIES.

The instant case principally involves a substantive due process rather than a procedural due process claim. Collins asserts that the City invaded the decedent's substantive due process right under the Fourteenth Amendment, to life, liberty and personal security.

However, the constitutional rights issues need not be decided by this Court, as they were not addressed by the Fifth Circuit below. *See e.g.*, 916 F.2d at 286-287; (Jt. App. at 45-46, 48). That Court decided only that Collins could not properly allege or prove "abuse of government power," as decedent's injury occurred in the course of his employment relationship. *E.g.*, 916 F.2d at 286-287; (Jt. App. at 45-46, 48).

If this Court were to hold that the Fifth Circuit erred in requiring "abuse of government power" as an additional element of a Section 1983 claim, or in holding that "abuse of government power" could not be alleged in the instant case, this Court could remand the cause to the Fifth Circuit for it to address in the first instance the question whether decedent enjoyed and alleged a substantive due process right to life and personal security and alleged that the city violated that right. *See, e.g., City of Canton v. Harris*, 489 U.S. 378 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). *Cf. DeShaney v. Winnebago Department of Social Services*, 489 U.S. 189, 195 n.2 (1989). If the Court proceeds to decide that issue, it should hold that Collins properly alleged a constitutionally protected interest cognizable under Section 1983.

A. A Full Panoply of Constitutional Rights Protects Public Employees from Adverse Actions by Their Employers Within the Employment Relationship.

Section 1983 liability of a municipality, acting as an employer, for violating municipal employees' federal rights was clearly established by the Court in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). Plaintiffs in that case were female employees of the New York City Board of Education's Department of Social Services. They challenged the Board's official policy that compelled pregnant employees to take unpaid leaves of absence before such leaves were medically required. They

sued the Board, ranking Board officers and the Mayor, only in their official capacities.

Overruling *Monroe v. Pope*, 365 U.S. 167 (1961) on the point, this Court held that municipalities can be liable under Section 1983, observing: "there can be no doubt that § 1 of the Civil Rights Act [of 1871, 17 Stat 13] was intended to provide a remedy, to be broadly construed, *against all forms of official violation of federally protected rights*." *Monell*, 436 U.S. at 700-701 (emphasis added). The sweep of Section 1983, according to the Court, was not to be confined, "absent a clear statement in the legislative history. . . . " *Id.* at 701. As this Court recognized in *Maine v. Thiboutot*, 448 U.S. 1 (1980), Section 1983 is a broad remedial statute that encompasses the violation, under color of state law, of all rights, privileges and immunities secured by the federal Constitution and laws. *Accord Monell*, 436 U.S. at 683-685. Nothing in the legislative history of Section 1983 would preclude it from providing a remedy to public employees whose constitutional rights have been invaded by their public employers.

Indeed, Mr. Shellabarger who reported out the bill that has become Section 1983 said:

> This section of the bill, . . . not only provides a civil remedy for persons whose former condition may have been that of slaves, *but to all persons where, under color of State law, they may be deprived of rights* to which they are entitled under the Constitution by reason and virtue of their national citizenship.
>
> Cong. Globe, 42d Cong., 1st Sess. App. 68 (emphasis added), quoted in *Monell*, 436 U.S. at 683; *Monroe*, 365 U.S. at 185 (1961).

In numerous cases since *Monell*, this Court has passed on Section 1983 claims against government prosecuted by government employees who allege violations of their federally protected rights. *E.g., Jett v. Dallas Independent School Dist.*, 491 U.S. 701 (1989); *City of St. Louis v. Praprotnick*, 485 U.S. 112 (1988); *O'Connor v. Ortega*, 480 U.S. 709 (1987); *Memphis School Dist. v. Stachura*, 477 U.S. 299 (1986).

In fact, even before *Monell* this Court had long held that claims of all kinds, arising under the Constitution and laws of the United States, can be asserted by public employees against their employers. To get to this point, the Court rejected the distinction or dichotomy between "rights," which are protected under the Constitution, and "privileges," which are not. *See e.g., Board of Regents v. Roth*, 408 U.S. 564, 571 n.9 (1972).

This dichotomy had gained force from Oliver Wendell Holmes' observation that a person may have a "right" to strike, but he has no right to public employment. *See McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892). Economic and other realities eventually put to rest the notion that since people could "choose" not to accept public employment, they accepted it without the benefit of protections other than those volunteered by the public employer.

By the 1960's, in numerous cases addressing loyalty oaths and national security regulations affecting government employees, this Court soundly rejected the right-privilege distinction as a basis for constitutional analysis in public employment cases. *See Baggett v. Bullitt*, 377 U.S. 360 (1964); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Whitehill v. Elkins*, 389 U.S. 54 (1967); *Connell v. Higgenbotham*, 403 U.S. 207 (1971).

In *Owen v. City of Independence*, 445 U.S. 622 (1980), this Court also rejected distinctions similar to the Fifth Circuit's employer-governmental functions distinction in holding that municipalities enjoy no qualified good faith immunity under Section 1983. In particular, the Court discussed the governmental functions/proprietary functions distinction and the discretionary decisions/ministerial actions distinction historically applied to activities of municipalities. The Court held that neither distinction affords a basis for concluding that, in enacting Section 1983, Congress *sub silentio* intended to extend the qualified good faith immunities of its agents to the municipality itself. 445 U.S. 644-650. Similarly the distinction between the municipality acting as government, as

opposed to the municipality acting as employer, cannot be the basis for deciding whether the municipality is subject to liability under Section 1983. *See also Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 531-547 (1985) (rejecting the traditional governmental functions exception to Congress' power under the Commerce Clause because that exception proved "unsound in principle and unworkable"). *Compare Marsh v. Alabama*, 326 U.S. 501 (1946) *with NCAA v. Tarkanian*, 488 U.S. 179 (1988).

Thus, this Court has recognized that government employees' constitutional rights are subject to protection, within the employment relationship, from invasion by public employers or their agents. By contrast, private employees enjoy no such constitutional protection nor the benefits of Section 1983 claims. *See Yeksigian v. Nappi*, 900 F.2d 101 (7th Cir. 1990). The following are among the constitutional protections afforded public employees from adverse action by their employers:

1. *First Amendment expressive freedom. E.g., Rutan v. Republican Party of Illinois*, 497 U.S. ___, 111 L.Ed.2d 52 (1990); *Rankin v. McPherson*, 483 U.S. 378 (1987); *Connick v. Myers*, 461 U.S. 138 (1983); *Branti v. Finkel*, 445 U.S. 507 (1980); *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 283-284 (1977); *Elrod v. Burns*, 427 U.S. 347 (1976); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). *See also Perry v. Sindermann*, 408 U.S. 593 (1972); *Baggett v. Bullitt, supra.*

2. *First Amendment religious freedoms. Cf. e.g., Hobbie v. Unemployment Appeals Com'n.*, 480 U.S. 136, 145 (1987); *Sherbert v. Werner*, 374 U.S. 398 (1963); *West Virginia Board of Education v. Barnett*, 319 U.S. 624 (1943); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

3. *Procedural Due Process – Protection of state created property interests in employment. E.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972). *City of St. Louis v. Prapotnick*, 485 U.S. 112

(1987). *See also Arnett v. Kennedy*, 416 U.S. 134 (1974) (by implication); *Connell v. Higgenbotham*, 403 U.S. 207 (1971).

4. *Procedural Due Process – Protection from false and stigmatizing charges that affect a person's future employment opportunities. E.g., Board of Regents v. Roth, supra; Codd v. Velger*, 429 U.S. 624 (1977); *Owen v. City of Independence*, 445 U.S. 622 (1980).

5. *The Equal Protection right to be free from invidious discrimination in employment. See, e.g., Rutan v. Republican Party of Illinois*, 497 U.S. ___, 111 L.Ed.2d 52 (1990); *Rankin v. McPherson*, 483 U.S. 378 (1987); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979); *Jett*, 491 U.S. 701; *Monell*, 436 U.S. 658. *See Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974) (by implication); *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947).

6. *The Fourth Amendment prohibition of unreasonable searches and seizures. See, e.g., National Treasury Employees Union v. Von Raab*, 489 U.S. 654 (1989); *O'Conner v. Ortega*, 480 U.S. 709 (1987); *See also Rankin v. McPherson*, 483 U.S. 378, 392 (1987) (Powell, J. concurring).

7. *The Fifth Amendment privilege against self incrimination. See, e.g., Malloy v. Hogan*, 378 U.S. 1 (1964); *Murphy v. Waterfront Commission of New York*, 378 U.S. 52 (1964); *Slochower v. Board of Education*, 350 U.S. 551 (1956).

Lower federal courts have correctly sustained additional claims under Section 1983, brought by public employees against their employers for violation of federally protected rights, that occur within the employment relationship. *Ruge*, 892 F.2d 738 (deliberate indifference to risk to sewer worker's on the job personal security and life); *Cornelius*, 880 F.2d 348 (deliberate indifference to town clerk's on the job personal security); *Yeksigian*, 900 F.2d 101 (deliberately causing an employee's false arrest); *Bohen v. City of East Chicago, Indiana*, 799 F.2d 1180, 1185-1189 (7th Cir. 1986) (on the job knowing and deliberate sexual harassment due to a municipal employer's policy or custom creating a hostile or abusive working environment); *Id.* at 1189-1192 (Posner, J. concurring) (policy or custom of failing to protect public

employee from sexual harassment). *See also Graham v. Davis*, 880 F.2d 1414, 1420-1421 (D.C. Cir. 1989) (no Section 1983 claim against the municipal employer based on injury by one plainclothes' police officer of another where there is no allegation that the injury resulted from the City's policy or custom of deliberate indifference to training, instruction, supervision and control of its officers; the officers may, however, sue one another).

As the cases demonstrate, it is much too late in the day for this Court to sanction the Fifth Circuit's unwarranted declaration that public employees cannot sue their employers under Section 1983.

B. Collins Has Properly Alleged That Decedent's Substantive Due Process Right to Life and Liberty-Personal Security Was Violated by the City's Deliberately Indifferent Actions and Policy and Custom.

As already noted in numerous cases, this Court has held that Section 1983 is a broadly stated remedial statute that should be liberally construed to assure protection of all federally secured rights in the absence of clear legislative history to the contrary. *E.g., Monroe*, 365 U.S. 167; *Maine*, 48 U.S. 1 (1980); *Monell*, 436 U.S. 658. To this end, the Court has acknowledged that Section 1983 is not displaced by the existence of state remedies that appear parallel to it. *See, e.g., Monroe, supra.* It has also acknowledged that artificial persons as well as natural persons may make claims under Section 1983. *See, e.g., Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989).

Most significantly, the Court has recognized numerous sources of federally secured rights that may be vindicated pursuant to Section 1983. Thus it has recognized that Section 1983 can be used to protect constitutional rights secured by specific provisions of the Bill of Rights, as well as substantive and procedural due process. *E.g., Daniels*, 474 U.S. 327. It has recognized that Section 1983 may be used to assert claims to redress violations of federal statutory rights, *see, e.g., Golden State Transit Corp., supra; Wilder v. Virginia*

Hospital Ass'n, 496 U.S. ___, 110 L.Ed.2d 455 (1990), as well as state created liberty and property interests. *See, e.g., Roth*, 408 U.S. 564. Section 1983 may even be employed to assert claims arising from constitutional provisions that concern the distribution of power between the federal and state governments, as opposed to personal liberty. *See Dennis v. Higgins*, 498 U.S. ___, 112 L.Ed.2d 969 (1991).

This Court has been particularly generous in its definition of "due process of law" under the Fourteenth Amendment. Due process plainly includes procedural due process. It also includes specific rights "incorporated" from provisions of the Bill of Rights and the remainder of the Constitution. Most importantly, this Court consistently has recognized that at the core of the constitutional doctrine of "due process of law" is substantive protection of all people from "*deliberate* decisions of government officials to deprive a person of life, liberty or property." *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (emphasis in original).

The Due Process Clause "was intended to secure the individual from the arbitrary exercise of the powers of government" *Ibid.*, quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884). As the *Daniels* Court stated:

> By requiring the government to follow appropriate procedures when its agents decide to "deprive any person of life, liberty or property," the Due Process Clause promotes fairness in decisions. And by barring certain governmental actions regardless of the fairness of the procedures used to implement them, *e.g., Rochin* [*v. California*, 342 U.S. 165 (1952) (stomach pumping)], it serves to prevent governmental power from being "used for purposes of oppression," *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How 272, 277, 15 L.Ed. 372 (1856) (discussing Due Process Clause of Fifth Amendment).
>
> *Daniels*, 474 U.S. at 331-332.

This Court also has held in many cases that government may not arbitrarily deprive someone of life. Most of these decisions involve specific constitutional guarantees. *Tennessee v. Garner*, 471 U.S. 1 (1985) (use of deadly force can

violate the right to Fourth Amendment protection from unreasonable searches and seizures); *Graham v. Conner*, 490 U.S. 386 (1989) (excessive force gives rise to a Fourth Amendment claim and analysis); *Brower v. County of Inyo*, 489 U.S. 593 (1989) (same); *Furman v. Georgia*, 408 U.S. 238 (1972) (arbitrary use of death penalty violates Eight Amendment). This Court has, however, expressly recognized the substantive due process right to a more generalized freedom from deliberate and unjustified intrusions on life and personal security. *E.g., City of Canton v. Harris*, 489 U.S. 378 (1989); *Ingraham v. Wright*, 430 U.S. 651, 673 (1977); *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Daniels v. Williams*, 474 U.S. 327 (1986).

Most commonly decisions addressing substantive due process rights to life, liberty or personal security concern government action (or inaction) that injures persons in government custody, or quasi-custody, or persons interacting with the police. Conceptually, however, such substantive due process protection has not been and should not be limited to such circumstances. *See, e.g., Ruge*, 892 F.2d 738; *Cornelius*, 880 F.2d 348. *McClary v. O'Hare*, 786 F.2d 83, 89 n.6 (2d Cir. 1986). For example, if the City's Sewer Department had a policy or custom of deliberate indifference to serious avoidable risks of explosions due to accumulated sewer gas, surely its inhabitants could sue the City under Section 1983 if such explosions caused them injury.

There are, moreover, graduations of government "custody" or restraint on liberty. At the most extreme are incarceration, arrest or civil commitment situations in which the injured individual is physically restrained by government. Other situations involve those of public school students, who are constrained by mandatory attendance laws. *Stoneking v. Bradford School District*, 882 F.2d 720 (3rd Cir. 1989). Still others involve children placed in state regulated private foster homes. *See Meador v. Cabinet for Human Resources*, 902 F.2d 474 (6th Cir. 1990); *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989).

Public employment usually does not involve custodial constraint on the worker's liberty. There are, however, constraints on the worker's liberty and mobility during working

hours. *See generally, Cornelius*, 880 F.2d 348. Moreover, it is a gross fiction, in a society that constantly suffers from significant levels of unemployment and underemployment, to pretend that government employees are free to quit their jobs to avoid unnecessary, and to them unapparent, risks to life and safety. It is a further fiction to suggest that the government employer owes its employees no substantive due process obligation to warn, train, supervise and equip them with respect to risks to the employees' life, liberty and personal security that are known to the employer and easily could be eliminated or ameliorated by it, were it not for the employer's policy or custom of deliberate indifference to those risks. *See Ruge*, 892 F.2d 738; *Cornelius*, 880 F.2d 348; *McClary*, 786 F.2d at 89 n.6.

There is sufficient play in the Due Process Clause itself for more general substantive protection of life and personal security, even within the employment relationship, for example where actions "under the color of state law" are so gross as to "shock the conscience." *Daniels v. Williams*, 474 U.S. 327, 331 (1986) citing *Rochin v. California*, 342 U.S. 165 (1952). Thus, in *Ruge* the Eighth Circuit correctly held that:

> The death of [a municipal employee] while working for the City does not, in itself, violate the constitution. The constitutional violation occurs when his death is caused by an inadequate municipal policy, adopted with its requisite culpability.
>
> 892 F.2d at 741 n.6.

See also McClary, 783 F.2d at 89 n.6; *Cornelius*, 880 F.2d at 348.

The facts alleged in the instant case, as in *Ruge*, "shock the conscience." They involve deliberately indifferent conduct by the City, despite a recent similar life threatening event involving decedent's supervisor, taken in the face of mandatory state obligations to warn, train, and properly equip and supervise.

1. The City Acted with Sufficient Recklessness as to Have Invaded Decedent's Substantive Due Process Rights.

In *McClary v. O'Hare*, 786 F.2d 83 (2d Cir. 1986), the Second Circuit affirmed the granting of a Rule 12(b)(6) motion to dismiss a Section 1983 wrongful death claim brought by the estate of a county highway department employee against state and county officials. "The actual holding in *McClary* is that the decedent's death was not caused by any established state procedure and therefore did not constitute a constitutional deprivation. 786 F.2d at 87." *Ruge*, 892 F.2d at 741. Lack of foreseeability (which was alleged in the instant case and in *Ruge*), was another problem in *McClary*. *See McClary*, 786 F.2d at 87, citing *Parratt v. Taylor*, 451 U.S. 527 (1981). Moreover, as the Fifth Circuit acknowledged in the instant case:

> Without expressing an opinion on the *McClary* holding, we do note that the *McClary* court stated [786 F.2d at 89 n.6 (emphasis added)]:
>
> Although we hold that reckless acts of a government employer that harm employees do not give rise to a substantive due process violation as long as the challenged conduct is not *uniquely governmental in character*, we by no means intend to exclude grossly negligent, reckless, or intentional abuses of *governmental* authority from the purview of section 1983. (Citations omitted). Nor do we view this decision as a grant of immunity to government employers acting as such. Where harms caused by government employers to their employees are attributable to the abuse of the government's authority rather than to an ordinary tort, such harms would continue to be actionable under § 1983.
>
> 916 F.2d at 290 n.8 (Jt. App. at 54 n.8) (emphasis in original).

McClary thus properly built upon this Court's *Daniels* decision. The Section 1983 allegations suggested by the *McClary* court as necessary to survive a Rule 12(b)(6)

motion, are the equivalent of the allegations of the instant complaint, with the addition of the *Harris* allegations against the City. As will appear below, this Court's *Harris* and *Daniels* analyses, as well as the *McClary* court's dictum and the Complaint in this case also track the standards of conduct elucidated by the *Restatement of Tort* and *Prosser*.

In *Daniels*, this Court held that violations of substantive Due Process rights were limited to claims based on "*deliberate* decisions of government officials to deprive a person of life, liberty or property." 474 U.S. at 331 (emphasis in original). Thus "mere lack of due care . . . [constituting] no more than a failure to measure up to the conduct of a reasonable person" is insufficient to make out a substantive due process violation. *Daniels*, 474 U.S. at 332. "Deliberate indifference" which is more than simple or gross negligence, but does not necessarily equate to intentional misconduct, is required. *Davidson v. Cannon*, 474 U.S. 344, 347 (1986); *see e.g., Estelle v. Gamble*, 429 U.S. 97, 104-106 (1976).

Harris originates from similar concerns, as municipal liability may not be based on the doctrine of *respondeat superior*, but must be based on the municipality's "policy or custom," which becomes the "moving force [behind] the constitutional violation." *Monell*, 436 U.S. at 694; *Polk County v. Dodson*, 454 U.S. 312 (1981). Hence in *Harris* this Court adopted essentially the same "deliberate indifference" standard establishing municipal liability for failures to train. Thus the Court held that:

> Only where a municipality's failure to train its employees in a relevant respect evidences a deliberate indifference to the rights of its inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under Section 1983. . . . Only where a failure to train reflects a "deliberate" or "conscious" choice by a municipality – a "policy" as defined by our prior cases – can a city be liable for such a failure under Section 1983.
>
> 489 U.S. at 389.

As Representative Sheldon said, arguing for passage of the statute that became Section 1983:

> It must be apparent that these amendments enlarge the power of the Government in controlling the action of the States and I believe that it can extend its power, through the courts, in times of peace, directly to the individual who is deprived of his rights, . . . whether through the positive act *or the default of the State authorities*.
>
> Cong. Globe, 42d Cong. 1st Sess. 367-68 (1871) (emphasis added).

Hence, in *Harris* the Court held that in a failure to train case the requisite "deliberate indifference" can be inferred from context:

> But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy-makers of the City can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.
>
> 489 U.S. at 390 (footnotes omitted).

Nothing in this Court's language or reasoning excludes municipal employees from this level of protection under Section 1983.

The *Restatement (Second) of Torts* and W. Prosser and W. P. Keeton, *Law of Torts* (5th Ed. 1984) are highly apposite in their analyses of standard of care. The usual tort standard of care is the "reasonable person" standard described in the *Restatement*, Section 283. To avoid being negligent (*i.e.*, to avoid the "unreasonable risk of harm," described in Section 282) an actor must conform to the standard of conduct of a reasonable person under like circumstances.

The *Restatement* contrasts negligence with recklessness on the basis of the proportion of harm to utility. Section 282, comment e; Section 500. Under the *Restatement* scheme of things, one is negligent if he fails to act as a reasonable person would in order to avoid unreasonable risks to others;

one moves from negligence to recklessness if the risk he fails to avoid is one completely out of proportion to the utility of person's activity. The reckless actor must also know or have reason to know of the facts that create the risk. Section 500, comments a, b, and c. The *Restatement* defines "intentional misconduct" as involving both knowledge that the harm is substantially certain to occur and the intent to cause the harm. Section 282, comment d; Section 500, comment f. Thus recklessness is distinguished from intent in two respects: the reckless actor creates a risk of harm, rather than a substantial certainty, and the reckless actor does not intend to cause the harm. *Accord*, Sections 8A, 870.

Prosser and Keeton, in Section 34, discuss two slightly different schemes of degrees of negligence. They note that some courts have recognized three levels of negligence: slight negligence, ordinary negligence, and gross negligence – gross negligence being not just a want of ordinary care, but want of any care at all. Pages 209-212. They then go on to discuss "wilful, wanton and reckless" actions. Pages 212-214. Prosser and Keeton note that courts describe gross negligence as worse than ordinary negligence, but not involving the "reckless disregard" of consequences that fits into the "wilful, wanton and reckless" category. They go on to define "wilful, wanton and reckless:"

> . . . the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences. . . . [This will be found] where the defendant, *whatever his state of mind*, has proceeded in disregard of a high and excessive degree of danger, either known to him or apparent to a reasonable person in his position.
>
> *Id.* at 213-214 (emphasis added).

This is very much like the standard described in the *Restatement* for recklessness.

Thus between Prosser and Keeton and the *Restatement*, one can create a scale of increasing negligence: slight negligence, ordinary negligence (failing to act as a reasonable man would to avoid risk), gross negligence (failing to act even as a careless man would), and recklessness (where not only is the risk way out of line, but the actor knew or should have known of the risk). Recklessness thus carries the implication of "conscious disregard" lacking in ordinary or even gross negligence.

Intentional torts involve a subjective state of mind, proven by either direct evidence or inference, that the actor in fact both intends to perform the deed *and* produce the harmful consequences of the act. *Restatement*, Section 870, comment a; Prosser and Keeton, Section 8 at p. 36. The continuum from "intent" to ordinary "negligence" is described as follows:

> Intent is not . . . limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. As the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes mere recklessness, as defined in § 500. As the probability decreases even further, and amounts only to a risk that the result will follow, it becomes ordinary negligence, as defined in § 282.
>
> *Restatement*, Section 8A, comment b at page 15.

See also, Prosser and Keeton, Section 8 at p. 36.

Sometimes the distinctions along the continuum are fine. But as this Court observed in *Daniels*, "the difference between one end of the spectrum – negligence – and the other – intent – is abundantly clear. *See* O. Holmes, The Common Law 3 (1923)." 474 U.S. at 335. *Accord*, Prosser and Keeton, Section 8 at p. 36. By allowing substantive due process-personal liberty claims and municipal liability-failure to train claims of municipal employees under Section 1983, only when based upon proper allegations of "deliberate indifference", there is no possibility that Section 1983 will become a font of ordinary tort liability. Section 1983 would remain available to redress only arbitrary and capricious acts of government.

2. Decedent Did Not Assume the Risks to Which he Succumbed.

This case does not involve an employee's acceptance of known risks inherent and apparent in the specific job he has taken. *Compare Zinermon v. Burch*, 494 U.S. ___, 108 L.Ed.2d 100 (1990). Unlike a fireman, a prison guard or a police officer, decedent did not volunteer for an obviously inherently and extraordinarily hazardous job. *See Ruge*, 892 F.2d 738; *Cornelius*, 916 F.2d 284. *See also, McClary*, 786 F.2d at 87 (2d Cir. 1986) (absence of foreseeability).

Once again it is useful to examine Prosser and Keeton and the Restatements. They reveal that assumption of risk bars liability in two situations: where the plaintiff has given his express consent to relieve the defendant of his duty of care, or where the plaintiff impliedly has consented to the risk of harm by voluntarily going forward in the face of a danger which the plaintiff knows of and appreciates. Interestingly enough, the doctrine has its roots in cases where the parties were master and servant. Prosser and Keeton, Section 68, p. 480.

Express consent to unnecessary risk is generally not applied in the employment setting. The bargaining power of the employer is such that the employee's consent to relieve the employer of liability is held not to be voluntary.

Proof of the plaintiff's implied acceptance of a risk depends on two elements. The plaintiff must know of and appreciate the risk, and must voluntarily choose to take the risk. Thus, the risk is not assumed if the employee only "has reason to know of the danger . . . [or] knows the facts but does not appreciate the risks; [is assumed] only where the Servant not only knows the facts but also realizes the likelihood of danger to him as a result of them." *Restatement (Second) of Agency* Section 521, comment c. Knowledge of a defect alone is not enough; the plaintiff must comprehend the danger presented by the defect. The standard is a subjective one. Unless the risk is "clear and obvious" to the injured person the question is not whether a "reasonable person" would appreciate the danger, *but whether the plaintiff did appreciate it*. Prosser and Keeton, Section 68, pp. 487-488.

It is the element of knowledge, and the dangers a plaintiff is assumed to understand, that go to the difference between a sewer worker and someone taking an obviously hazardous job, for example a policeman, prison or jail guard, or firefighter. The *Restatement (Second) of Torts* points out that "the risk inseparable from the great majority of abnormally dangerous activities is, however, a matter of such common knowledge and general notoriety that, in the absence of special circumstances . . . a plaintiff may often be found to have the knowledge notwithstanding his own denial." Section 523, comment c. The *Restatement* uses the example of a plaintiff who takes a job driving a truck full of nitroglycerin. *Id.* comment d.

The *Restatement (Second) of Agency* states that "[i]f the risk exists at the beginning of the employment and is a risk arising from the general nature of the business or the manner in which it is conducted . . . it is ordinarily inferred that the servant knows of and understands it . . . [I]n an employment in which the risks are obvious only to those experienced in it, it may be shown that the employee was inexperienced and hence did not realize them." Section 521, comment c. Even an inexperienced firefighter, police officer, or jailer would have a hard time pleading or showing that he did not understand that he might get burned, or hurt by a perpetrator or a prisoner. By contrast, an inexperienced sewer worker might easily not understand the dangers of sewer gas – especially where, as here, the employer failed to warn and train him and to properly equip and supervise him regarding those dangers.

Thus, unlike what may have been true of most of the Circuit Court cases relied upon by the Fifth Circuit below, 916 F.2d at 288-289 (Jt. App. at 49-53), it cannot be said here that decedent "assumed" the risk to which he actually succumbed, as it was not a risk he knew or had to know was inherent in his job. By contrast to the instant case, most of the Circuit Court decisions relied on by the Fifth Circuit, 916 F.2d at 288-289 (Jt. App. at 49-52), involved police officers and jailers injured by prisoners or arrestees. *See de Jesus*

Benavides v. Santos, 883 F.2d 385 (5th Cir. 1989); *Hogan v. City of Houston*, 819 F.2d 604 (5th Cir. 1987); *Washington v. District of Columbia*, 802 F.2d 1478 (D.C. Cir. 1986); *Walker v. Rowe*, 791 F.2d 507 (7th Cir. 1986). Those decisions are inapposite because the plaintiffs assumed just those risks when they took their inherently dangerous jobs. *See Cornelius*, 916 F.2d 284.

Those cases are also inapposite because the plaintiffs' injuries were not caused by persons acting "under color of state law" but were caused by intervening private actors. *Compare Dawson v. Milwaukee Housing Authority*, 930 F.2d 1283 (7th Cir. 1991) (one resident of a public housing project shot by another resident) *with Graham v. Davis*, 880 F.2d 1414, 1420-1421 (D.C. Cir. 1989) (two plainclothes policemen shot one another). *See DeShaney*, 489 U.S. 189; *Stoneking v. Bradford School District*, 882 F.2d 720, 724-725 (3rd Cir. 1989).

In the instant case, as in *Ruge* and *Cornelius*, Collins has alleged knowing, deliberately indifferent conduct under color of state law that, together with the City's policy or custom of deliberate indifference to decedent's life and liberty-personal security, caused plaintiff's death. If a municipal employer need not stand to answer such a claim, it is hard to conceive of a case in which it must respect its employees' substantive due process rights to life or personal security. Compare, *e.g.*, *Rochin v. California*, 342 U.S. 165 (1952).

IV. THE TEXAS HAZARD COMMUNICATION ACT CREATES A FOURTEENTH AMENDMENT DUE PROCESS LIBERTY INTEREST, THAT MAY BE ASSERTED UNDER SECTION 1983, IN PROTECTION FROM THE VERY HAZARDS TO WHICH DECEDENT SUCCUMBED.

In *DeShaney*, this Court reserved the question whether state statutes that give a person "an 'entitlement' to receive protective services in accordance with the terms of the statute, create an entitlement which would enjoy due process protection against state deprivation under our decision in *Board of Regents v. Roth*, 408 U.S. 564 (1972)." 489 U.S. at

195 n.2. The issue was not pleaded in the *DeShaney* complaint and was raised for the first time in this Court. *Ibid.*

By contrast, the issue or claim that decedent enjoyed a due process right because of the Texas Hazard Communication Act (Br. App. at A-3 – A-17), was pleaded in Collins' Complaint (Jt. App. at 6, ¶¶ 14-19; at 7, ¶ 5), raised before the District Court in briefs (Jt. App. at 22, 36-40), argued to the Fifth Circuit, 916 F.2d at 287 n.3 (Jt. App. at 48-49 n.3), and presented in Petitioner's Petition for Writ of Certiorari and Reply Brief. Hence it is properly before this Court.

However, neither the District Court nor the Fifth Circuit reached the issue. *See* 916 F.2d at 287 n.3 (Jt. App. at 48-49 n.3). Hence, this Court need not reach the issue in this case, even if it rules in Collins' favor. It may remand to the Fifth Circuit for its reconsideration. *See* Point III, *supra*, at 24.

If the Court chooses to reach the issue in this case, it should decide that Collins has properly alleged a Fourteenth Amendment Due Process life and liberty violation arising from the substantive predicates of the Texas Hazard Communication Act, which mandates protective action by the City that would have eliminated or ameliorated the risks to decedent. *Cf., e.g., Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989); *Board of Regents v. Roth*, 408 U.S. 564 (1976). Moreover, in light of the risk to decedent's life resulting from the City's failure to obey the clear mandates of the statute, the City can assert no appropriate interest to justify its failure to comply. *Cf. e.g., Mathews v. Eldridge*, 424 U.S. 319 (1976).

Fourteenth Amendment liberty interests are created by state law only when the state statute creates specific substantive predicates that mandate action and an outcome favorable to the protected class if those predicates are followed. *See, Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989); *Hewitt v. Helms*, 459 U.S. 460, 472-476 (1983). As will appear below, the Texas Hazard Communication Act fully meets these requirements.

As discussed in point III A, *supra*, this Court has held that state created property interests, including property interests in employment with a public entity, give rise to procedural due process protections. *E.g., Board of Regents v. Roth*, 408 U.S. 564; *Perry v. Sinderman*, 408 U.S. 593 (1972); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). The Court has also held that state created "liberty" interests relating to public employment similarly give rise to constitutional procedural due process protection. *E.g., Board of Regents v. Roth*, 408 U.S. 564.

In addition, in numerous cases this Court has extended procedural due process protections to other state created liberty interests. *E.g., Board of Pardons v. Allen*, 482 U.S. 369 (1987) (state law stating that parole "shall" be granted under certain conditions creates liberty interest); *Mills v. Rogers*, 457 U.S. 291 (1982) (mental patients' state statutory right to refuse anti-psychotic drugs creates a liberty interest); *Vitek v. Jones*, 445 U.S. 480, 488 (1980) (liberty interest created by statute providing that prisoners may not be transferred to mental hospitals except on certain conditions); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979) (liberty interest created by state parole statute); *Hewitt v. Helms*, 459 U.S. at 472-476 (1983) (mandatory state statutes and regulations create a liberty interest in remaining in prison's general population as opposed to segregation), *Board of Regents v. Roth*, 408 U.S. 564 (liberty interest in freedom from false and stigmatizing charges that affect a person's future employment opportunities); *Codd v. Velger*, 429 U.S 624 (1977) (same).

In carefully constrained circumstances, substantive interests that are created or mandated by state statutes, such as the Texas Hazard Communication Act, also give rise to substantive due process protections under the Fourteenth Amendment. The Court has not squarely addressed the issue. *See DeShaney*, 489 U.S. at 195 n.2; *Youngberg v. Romeo*, 457 U.S. 307, 316 n.19 (1982). However, the Court has made it plain that the core of substantive due process protection — freedom from unwarranted arbitrary and capricious government action that seriously affects one's liberty — comes into play upon state recognition of such a liberty interest. *See Daniels*, 474

U.S. 327. *See also, Superintendent v. Hill*, 472 U.S. 445 (1985) (prison segregation decisions must be based on "some evidence"). Analytically, when the state creates a liberty or property interest, there is no reason then to impose on state actors only procedural due process obligations.

State statutory law would no more be constitutionalized under Section 1983, by recognizing substantive due process protection of such state created interests, than has federal statutory law been constitutionalized under the Fourteenth Amendment by allowing federal statutory rights to be asserted under Section 1983. *See, e.g., Golden State Transit Corp.*, 493 U.S. 103 (1989).

It is true that "mere violation of a state statute does not infringe the federal Constitution." *Snowden v. Hughes*, 321 U.S. 1, 11 (1944). However, as the procedural due process decisions make abundantly clear, state statutes and regulations do create substantive interests that are subject to constitutional protection. Under numerous other decisions of this Court, statutorily created interests are also subject to substantive constitutional protections, such as those of the First Amendment, Fourth Amendment, Fifth Amendment, and the Equal Protection clause.

"Substantive due process" also constrains state action that violates state created liberty interests. This follows from this Court's appreciation that "a state creates a protected liberty interest by placing substantive limitations on official discretion." *Olin v. Wakinekona*, 461 U.S. 238, 249 (1983). *See Superintendent v. Hill*, 472 U.S. 445 (1985).

This Court has assumed, in a setting analogous to public employment, the existence of a student's substantive due process right to be free from arbitrary dismissal from a State University's medical education program. *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985). In a concurring opinion in *Ewing*, Justice Powell, stating that it was unnecessary for the Court to make that assumption, cautioned that:

> While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, [citation

> omitted] substantive due process rights are created only by the Constitution.
>
> 474 U.S. at 229.

Justice's Powell's analysis, however, correctly acknowledged that a state created property interest could, in an employment setting, give rise to substantive due process protections. *Id.* at 230, citing *Harrah Independent School District v. Martin*, 440 U.S. 194 (1978).

Moreover, Justice Powell, speaking for the Court in *Mills v. Rogers*, 457 U.S. 291 (1982), recognized:

> As a practical matter, both the substantive and procedural [due process] issues are intertwined with questions of state law. In theory a court might be able to define the scope of a patient's federally protected liberty interest without reference to state law. Having done so, it might then proceed to adjudicate the procedural protection required by the Due Process Clause for the federally protected interest alone. . . . For purposes of determining actual rights and obligations, however, questions of state law cannot be avoided. Within our federal system the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution. . . . . If so, the broader state protections would actually define the substantive rights possessed by a person living within that State.
>
> *Id.* at 300 (citations and footnote omitted).

Virtually all entitlements to liberty and property are created by the states. That is why, after all, the first words of the Fourteenth Amendment are: "*All persons born or naturalized in the United States are citizens of the United States and of the State wherein they reside.*" (emphasis added). *See also, Connecticut v. Doehr*, ___ U.S. ___, 59 U.S.L.W. 4587 (June 6, 1991) (No. 90-143).

The substantive and procedural due process components frequently are more than intertwined. *E.g., Bearden v. Georgia*, 461 U.S. 660, 666 n.7 (1983); *Douglas v. Buder*, 412 U.S. 430, 454 (1973); *Ellard v. Alabama Board of Pardons and Paroles*, 824 F.2d 937, 945-946 (11th Cir. 1987). *See Superintendent v. Hill*, 472 U.S. 445 (1985). Especially in a case like the instant one, in which the state created substantive interest is protection of life and enhancement of personal security, through imposition of express obligations to train, warn and properly equip a worker, the substantive and procedural due process components merge. *See, e.g., Meador v. Cabinet for Human Resources*, 902 F.2d. 474 (6th Cir. 1990) (state created entitlement to personal security of children placed in state regulated foster homes); *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) *cert. denied*, 489 U.S. 1065 (same); *Anderson v. City of New York*, 611 F.Supp. 481, 488-491 (S.D.N.Y.) (state created liberty interest in reputation and privacy).

Even assuming the absence of a substantive due process interest arising directly under the Constitution, therefore, the State of Texas has created a liberty interest that is entitled to full due process protection under Section 1983, in that the Texas Hazard Communication Act has created specific substantive predicates that mandate action and an outcome favorable to decedent if those predicates are followed. *See, Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989); *Hewitt v. Helms*, 459 U.S. 460, 472-476 (1983).

The Texas Hazard Communication Act is mandatory in terms of the obligations imposed on municipal employers. That statute also identifies the class of persons (including decedent) protected and the class of persons (including the City) obligated to provide protection. Finally, it sets forth substantive predicates that mandate elimination, or at least amelioration, of the risks to decedent's life and personal security.

The statute protects workers from hazardous chemicals, such as sewer gas. (Br. App. at A-4-5, Section 2, Texas Health and Safety Code ("H.&S.C.") Section 502.002 (Vernon, 1991), Br. App. at A-6, Section 3(9), H.&S.C. Section 502.003(12)). Its protection extends to people working for municipal employers. (Br. App. A-6, Section 3(13), H.&S.C. Section 502.003(16)). It mandates that "an employer *shall*" "educate," "train" and "instruct" employees, especially "new"

employees concerning the hazardous chemicals they will encounter. (Br. App. at A-11 Section 10(a), *see* H.&S.C. Section 502.010(a), (c) and (d)) (emphasis added). It also provides that:

> new or newly assigned employees *shall* be provided training *before* working with or in a work area containing hazardous chemicals.
>
> (Br. App. at A-11, Section 10(a), H.&S.C. Section 502.010(d)) (emphasis added).

The Statute also provides that the employer's training program must include:

> . . . the location, acute and chronic effects, and safe handling of hazardous chemicals used by the employees; protective equipment and first aid treatment to be used with respect to the hazardous chemicals used by the employees; and general safety instructions on the handling, cleanup procedures, and disposal of hazardous chemicals.
>
> (Br. App. at A-11, Section 10(b), H.&S.C. Section 502.010(f)(2) and (4)).

Significantly affirmative rights are provided to the employees under the Statute:

> Employees who may be exposed to hazardous chemicals *shall* be informed of the exposure. . . . In addition, employees *shall* receive training on the hazards of the chemicals and on measures they can take to protect themselves from those hazards and shall be provided with appropriate personal protective equipment. *These rights are guaranteed* on the effective date of this Act.
>
> (Br. App. at A-14, Section 15(a), H.&S.C. Section 502.013(b)) (emphasis added).

In addition, the Statute requires employers to post notice of the statutory requirements. (Br. App. at A-8, Section 5, H.&S.C. Section 502.013(a)). By regulation, that notice must specify the protections stated above. (Br. App. at A-21(a), Texas Administrative Code Section 295.5 (West)). Employees are also protected from retaliation by their employers for asserting rights under the Statute. (Br. App. at A-14(b), Section 15(a), H.&S.C. Section 502.013(c)).

Given the nature of the risks and injuries to its employees, including decedent, that have resulted from the City's failure to comply with its mandatory obligations under the statute, a post-deprivation remedy could not satisfy the City's procedural or substantive due process obligations. Moreover, as a liberty interest is engaged, the doctrine of *Parratt v. Taylor*, 451 U.S. 527 (1981) and *Hudson v. Palmer*, 468 U.S. 517 (1984) is not involved. *See Zinermon v. Burch*, 494 U.S. ___, 108 L.Ed.2d 100 (1990).

Finally, given the terms of the Texas Hazard Communication Act, even applying a procedural due process analysis, only one outcome is possible upon balancing: (1) the private interest at stake (decedent's life and personal security), (2) the risk of unwarranted deprivation of that interest through failure to comply with the statute, and (3) the City's interest, including the fiscal and administrative burdens of compliance with the statutory procedures. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319 (1976). *Hewitt v. Helms*, 459 U.S. 460 (1983). Decedent's private interest in his life and personal security were as precious as they come, and given the State of Texas' declared legislative policy, the City can assert no legitimate government interest in non-compliance.

To the extent that the Court may be concerned that extending procedural or substantive due process protection to interests such as those created by the Texas Hazard Communication Act may unduly expand the Due Process Clause or Section 1983, sufficient limitation is provided by rigorous application of the *Thompson* mandatory substantive predicates requirement and the *Mathews* balancing of factors required for a due process violation.

CONCLUSION

For the foregoing reasons, the Judgment of the United States Court of Appeals for the Fifth Circuit should be reversed and the case should be remanded to that court with instructions to direct the United States District Court for the Western District of Texas to vacate its Judgment of dismissal. Alternatively the Court should instruct the Court of Appeals

to decide or have the district court decide, in the first instance, the question whether Collins has properly claimed due process rights protected by the Fourteenth Amendment.

June 18, 1991

Respectfully submitted,

SANFORD JAY ROSEN
Attorney of Record
for Petitioner

Constitutional Provision and Statutes

Fourteenth Amendment to the Constitution of the United States

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

Federal Rules of Civil Procedure, Rule 12. (b) Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party

under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Texas
Hazard
Communication
Act and Rules

(seal)

TEXAS DEPARTMENT OF HEALTH
AUSTIN, TEXAS

HAZARD COMMUNICATION ACT AND RULES

Enacted by the 69th Legislature, 1985. Amended 1987. Codified in *Vernon's Texas Civil Statutes* as Title 83, Article 5182b. Rules adopted by the Board of Health were published in the *Texas Register* as §§295.1-295.8 in 10 *TexReg* 4889-4890, 11 *TexReg* 850-852, 4159-4161 (1986); and §§295.2 and 295.9 in 12 *TexReg 3551-3553 (1987).*

Note:

New organizational names within the Texas Department of Health are used in this pamphlet. "Occupational Health Program" has been changed to "Hazard Communication Branch,

Division of Occupational Safety and Health". These changes have not yet been formally made to the Board of Health rules.

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Title 83, Art. 5182b.
HAZARD COMMUNICATION ACT

AN ACT

Short Title

Sec. 1. This article may be cited as the "Hazard Communication Act."

Declaration of Purpose

Sec. 2. The legislature finds that the health and safety of persons living and working in the State of Texas may be improved by providing access to information regarding hazardous chemicals to which they may be exposed either during their normal employment activities, during emergency situations, or as a result of proximity to the manufacture or use of those chemicals. The legislature also finds that many employers in the State of Texas have already established suitable information programs for their employees and that access to that information is scheduled to be required of all manufacturing employers by November 1985 under the federal Occupational Safety and Health Administration's (OSHA) Hazard Communication Standard. It is the intent and purpose of this Act to assure that, in the event that the OSHA standard does not take effect or remain in effect, accessibility to information regarding hazardous chemicals be provided to employees who may be exposed to those chemicals in manufacturing employer workplaces. It is also the intent and purpose of this Act that the information be provided to employees who may be exposed to hazardous chemicals in

nonmanufacturing employer workplaces, to emergency service organization responsible for dealing with chemical hazards during emergency situations, and to the commissioner of health to make the information available to the general public through specific procedures.

Definitions

Sec. 3. In this Act:

(1) "Chemical name" means the scientific designation of a chemical in accordance with the nomenclature system developed by the International Union of Pure and Applied Chemistry (IUPAC) or the Chemical Abstracts Service (CAS) rules of nomenclature, or a name that will clearly identify the chemical for the purpose of conducting a hazard evaluation.

(2) "Common name" means any designation of identification such as code name, code number, trade name, brand name, or generic name used to identify a chemical other than by its chemical name.

(3) "Chemical manufacturer" means an employer in Standard Industrial Classification (SIC) Codes 20 through 39 with a workplace where chemicals are produced for use or distribution.

(4) "Designated representative" means the individual or organization to whom an employee gives written authorization to exercise the employee's rights under this Act. A recognized or certified collective bargaining agent shall be treated automatically as a designated representative without regard to written employee authorization.

(5) "Distributor" means any business, other than a chemical manufacturer or importer, that supplies hazardous chemicals to other distributors or to purchasers.

(6) "Employee" means any person who may be or may have been exposed to hazardous chemicals in the person's workplace under normal operating conditions or foreseeable emergencies. Office workers, ground maintenance workers, security personnel, or nonresident management are not

included unless their job performance routinely involves potential exposure to hazardous chemicals. The term "employee" includes persons working for the State of Texas and its political subdivisions, as well as members of volunteer emergency service organizations.

(7) "Expose" or "exposure" means that an employee is subjected to a hazardous chemical in the course of employment through any route of entry, including inhalation, ingestion, skin contact, or absorption, and includes potential, possible, or accidental exposure.

(8) "Fire chief" means the elected or paid administrative head of a fire department as defined in Chapter 125, Acts of the 45th Legislature, Regular Session, 1937 (Article 6243e, Vernon's Texas Civil Statutes).

(9) "Hazardous chemical" means any element, chemical compound, or mixture of elements or compounds that is a physical hazard or health hazard as defined by the OSHA standard in 29 CFR Section 1910.1200(c), or a hazardous substance as defined by the OSHA standard in 29 CFR Section 1910.1200(d)(3).

(10) "Label" means any written, printed, or graphic material displayed on or affixed to containers of hazardous chemicals.

(11) "Manufacturing employer" means an employer with a workplace classified in Standard Industrial Classification (SIC) Codes 20 through 39 who manufacturers (sic) or uses a hazardous chemical.

(12) "Material safety data sheet" ("MSDS") means a document containing chemical hazard and safe handling information, provided that after November 25, 1985, "MSDS" means a document prepared in accordance with the requirements of the OSHA standard for that document.

(13) "Nonmanufacturing employer" or "employer" means an employer with a workplace in Standard Industrial

Classification (SIC) Codes 46 through 49 (pipelines, transportation services, communications and electric, gas, and sanitary services), 51 (wholesale trade, nondurable goods), 75 (automotive repair, services, and garages), 76 (miscellaneous repair services), 80 (health services), 82 (educational services), and 84 (museums, art galleries, botanical, and zoological gardens); the State of Texas and its political subdivisions and all volunteer emergency service organizations. If the OSHA standard does not take effect or remain in effect, "employer" also includes manufacturing employer.

(14) "OSHA standard" means the Hazard Communication Standard issued by the Occupational Safety and Health Administration in 48 Federal Register 53280 et seq. (November 25, 1983), to be codified under Title 29 of the Code of Federal Regulations (CFR) Section 1910.1200.

(15) "Commissioner" means the commissioner of health.

(16) "Work area" means a room or defined space in a workplace where hazardous chemicals are produced or used and where employees are present.

(17) "Workplace" means an establishment at one geographical location containing one or more work areas.

(18) "Workplace chemical list" means the list of hazardous chemicals developed under Section 6 of this Act or Section 1910.1200(e)(i) of the OSHA standard.

(19) "Board" means the Texas Board of Health.

(20) "Department" means the Texas Department of Health.

Relationship To OSHA Standard

Sec. 4(a) Manufacturing employers and distributors that are regulated by and complying with the provisions of the OSHA standard are exempt from this Act except for Sections 6(d), 6(e), 7(a), 7(d), 9, 13(c), 13(d), 13(e), and 15 of this Act. Manufacturing employers and distributors are subject to

this Act if the OSHA standard does not take effect or remain in effect.

(b) Nonmanufacturing employers that adopt and comply with the provisions of the OSHA standard may be certified by the commissioner as being in compliance with this Act except for Sections 6(d), 6(e), 7(a), 7(d), 9, 13(c), 13(d), 13(e), and 15 of this Act. This certification shall be done annually.

Notice to Employees

Sec. 5. Employers shall post adequate notice, at locations where notices are normally posted, informing employees about their rights under this Act. In the absence of a notice prepared by the commissioner under Section 14 of this Act, an employer notice shall be posted.

Workplace Chemical List

Sec. 6. (a) Employers shall compile and maintain a workplace chemical list which shall contain the following information for each hazardous chemical normally used or stored in the workplace in excess of 55 gallons or 500 pounds or an amount that the board determines by rules for certain highly toxic or dangerous hazardous chemicals:

(1) the chemical name and the common name used on the MSDS and container label;

(2) the nomenclature used in identifying the chemical name; and

(3) the work area in which the hazardous chemical is normally stored or used.

(b) The workplace chemical list shall be updated as necessary but not less frequently than annually.

(c) The workplace chemical list may be prepared for the workplace as a whole or for each work area, provided that the list is readily available to employees and their representatives. New or newly assigned employees shall be made aware

of the workplace chemical list before working with or in a work area containing hazardous chemicals.

(d) The workplace chemical list shall be provided to the commissioner on the effective date of this Act or, for an employer or manufacturing employer that begins operation after the effective date of this Act, within 60 days after the date on which it begins operation.

(e) The workplace chemical list shall be maintained by the employer or manufacturing employer for 30 years. Complete records shall be sent to the commissioner if the business ceases to operate within the state.

Material Safety Data Sheets

Sec. 7. (a) Chemical manufacturers and distributors shall provide manufacturing and nonmanufacturing purchasers of hazardous chemicals in this state appropriate MSDSs for the hazardous chemicals purchased.

(b) Employers shall maintain the most current MSDS received from manufacturers or distributors for each hazardous chemical purchased. If an MSDS has not been provided by the manufacturer or distributor for chemicals on the workplace chemical list at the time the chemicals are received at the workplace, the employer shall request one in writing from the manufacturer or the distributor in a timely manner.

(c) Material safety data sheets shall be readily available on request, for review by employees or designated representatives.

(d) A copy of an MSDS shall be provided to the commissioner on request. The commissioner shall request an MSDS from an employer or manufacturing employer when an MSDS is requested by a person if that request is based on a review of the employer's or manufacturing employer's workplace chemical list by the person requesting the MSDS.

Labels

Sec. 8. (a) Existing labels on incoming containers of hazardous chemicals may not be removed or defaced.

(b) Employees may not be required to work with a hazardous chemical from an unlabeled container except for a portable container intended for the immediate use of the employee who performs the transfer.

Emergency Information

Sec. 9. (a) Employers or manufacturing employers who normally store a hazardous chemical in an amount in excess of 55 gallons or 500 pounds or in an amount the board determines by rule for certain highly toxic or dangerous hazardous chemicals shall provide to the fire chief of the fire department having jurisdiction over the workplace, in writing, the names and telephone numbers of knowledgeable representatives of the employer or manufacturing employer who can be contacted for further information or contacted in case of an emergency.

(b) Each employer or manufacturing employer shall provide a copy of the workplace chemical list to the fire chief on request. The employer shall notify the fire chief of any significant changes that occur in the workplace chemical list.

(c) The fire chief or his representative, on request, should be permitted to conduct on-site inspections of the chemicals on the workplace chemical list for the sole purpose of preparing fire department activities in case of an emergency.

(d) Employers or manufacturing employers shall provide to the fire chief, on request, a copy of the MSDS for any chemical on the workplace chemical list.

(e) The fire chief shall make the workplace chemical list and MSDSs available to members of the fire department having jurisdiction over the workplace and to other personnel

outside the fire department who are responsible for preplanning emergency activities, but may not otherwise distribute the information without approval of the employer or manufacturing employer.

Employee Education Program

Sec. 10. (a) Every employer shall provide, at least annually, an education and training program for employees using or handling hazardous chemicals. Within 30 days of providing the education and training program, an employer shall report to the commissioner that the program has been provided to the employees. Additional instruction shall be provided when the potential for exposure to hazardous chemicals is altered or when new and significant information is received by the employer concerning the hazards of a chemical. New or newly assigned employees shall be provided training before working with or in a work area containing hazardous chemicals.

(b) The program must include, as appropriate, information on interpreting labels and MSDSs and the relationship between those two methods of hazard communication; the location, acute and chronic effects, and safe handling of hazardous chemicals used by the employees; protective equipment and first aid treatment to be used with respect to the hazardous chemicals used by the employees; and general safety instruction on the handling, cleanup procedures, and disposal of hazardous chemicals. Employers shall keep a record of the dates of training sessions given to employees.

(c) The commissioner, under Section 14 of this Act, shall develop an education and training assistance program to aid those employers who, because of size or other practical considerations, are unable to develop the programs by themselves. The program shall be made available to such an employer on request.

Construction of Act

Sec. 11. The provision of information to an employee does not in any way affect the liability of an employer with regard to the health and safety of an employee or other person exposed to hazardous chemicals, nor does it affect the employer's responsibility to take any action to prevent the occurrence of occupational disease as required under any other provision of law. The provision of information to an employee does not affect any other duty or responsibility of a manufacturer, producer, or formulator to warn ultimate users of a hazardous chemical under any other provision of law.

Powers and Duties of Board

Sec. 12. The board may, in the manner provided by law, adopt rules and administrative procedures reasonably necessary to carry out the purposes of the Act.

Complaints, Investigations, Penalties

Sec. 13. (a) Complaints received in writing from employees or their designated representatives relating to alleged violations of this Act by nonmanufacturing employers shall be investigated in a timely manner by he [sic] commissioner or his designated representative. Complaints from employees or their designated representatives relating to alleged violations by manufacturing employers shall be referred to the federal Occupational Safety and Health Administration by the complainant. However, complaints shall be investigated by the commissioner or his designated representative if the OSHA standard does not take effect or does not remain in effect or if the complaint is based on a requirement under this Act.

(b) Officers or duly designated representatives of the Commissioner, on presentation of appropriate credentials, have the right of entry into any workplace at reasonable times to inspect and investigate complaints.

(c) Employers and manufacturing employers found to be in violation of this Act have 14 days to comply. Employers and manufacturing employers not complying within 14 days following written notification of a violation are subject to an administrative penalty of not more than $500 per violation.

(d) If required under this Act, employers and manufacturing employers who knowingly disclose false information or negligently failed to disclose a hazard are subject to a civil fine of not more than $5,000 per violation. This section does not affect any other right of an employee or any other person to receive compensation for damages under other law.

(e) If required under this Act, employers and manufacturing employers who proximately cause an injury to an individual by knowingly disclosing false hazard information or knowingly failing to disclose hazard information are subject to a criminal fine of not more than $25,000. This section does not affect any other right of an employee or any other person to receive compensation for damages under other law.

Outreach Programs

Sec. 14. (a) The commissioner shall develop and provide to each employer a suitable form of notice providing employees with information regarding their rights under this Act.

(b) As part of the outreach program, the commissioner shall develop an education and training program consisting of instructional materials to assist employers under Section 10 of this Act.

(c) As part of the outreach program, the commissioner shall develop and distribute a supply of informational leaflets on employers' duties, employee rights, the public's ability to obtain information under this Act, the outreach program, and the effects of hazardous chemicals.

(d) The commissioner may contract with a public institution of higher education or other public or private organizations to develop and implement the outreach program.

(e) The commissioner shall publicize the availability of information to answer inquiries from employees, employers, or the public in this state concerning the effects of hazardous chemicals.

(f) In cooperation with the commissioner, an employer may provide an outreach program in the community.

Employee Rights

Sec. 15. (a) Employees who may be exposed to hazardous chemicals shall be informed of the exposure and shall have access to the workplace chemical list and MSDSs for the hazardous chemicals. Employees, on request, shall be provided a copy of a specific MSDS with trade secret information, if any, deleted. In addition, employees shall receive training on the hazards of the chemicals and on measures they can take to protect themselves from those hazards and shall be provided with appropriate personal protective equipment. These rights are guaranteed on the effective date of this Act.

(b) An employer or manufacturing employer may not discharge, cause to be discharged, otherwise discipline, or in any manner discriminate against an employee because the employee has filed a complaint, assisted an inspector of the department who may make or is making an inspection under Section 13 of this Act, instituted or caused to be instituted any proceeding under or related to this Act, testified or is about to testify in such a proceeding, or exercised any rights afforded under this Act on behalf of the employee or on behalf of others. Pay, position, seniority, or other benefits may not be lost as the result of the exercise of any right provided by this Act.

(c) Any waiver by an employee of the benefits or requirements of this Act is against public policy and is null and void. Any employer's or manufacturing employer's request or requirement that an employee waive any rights under this Act as a condition of employment is a violation of this Act.

Protection of Trade Secrets

Sec. 16. (a) An employer who believes that all or any part of the information required under Section 6, 9(b), or 9(d) is a trade secret may withhold the information, provided that:

(1) material safety data sheets are available to employees in the area where they work;

(2) hazard information on the trade secret chemicals, or an MSDS with trade secret information deleted, is provided to the fire chief and the commissioner, on request;

(3) all relevant information is provided to a physician diagnosing and treating a person exposed to the chemical, under requirements stated in the OSHA standard in 29 CFR Section 1910.1200(i)(2); and

(4) the employer can substantiate the trade secret claim. For purposes of this Act, the requirements in the OSHA standard for physicians treating employees shall apply to physicians treating persons.

(b) The commissioner, on his own initiative or on the request of an employee, the employee's designated representative, a fire chief, or a person who made a request under Section 7(d) of this Act, may request any or all of the data substantiating the trade secret claim to determine whether the claim made under Subsection (a) of this section is valid. When making a determination of a trade secret claim under this subsection, the commissioner shall conduct a reasonable search of available literature to determine if the hazard information is accurate. If the commissioner, based on his review of the health and safety information made available by the employer and other available information, has determined that the MSDS does not reflect a prudent assessment of the scientific evidence regarding hazards, then the commissioner shall add an addendum to the MSDS over his signature reflecting his opinion of a prudent assessment of the scientific evidence. The assessment shall be complete within 90 days of the commissioner's receipt of the information or data substantiating the trade secret claim. The commissioner shall protect

from disclosure any or all information coming into his possession when the information is marked by the employer as confidential, and shall return all information so marked to the employer at the conclusion of a final determination.

(c) The employer has 30 days after notification by the commissioner that a trade secret claim is not valid to petition for judicial review. Judicial review shall be by trial de novo in a district court of Travis County.

Exemptions

Sec. 17. (a) Notwithstanding any language to the contrary, the provisions of this Act do not apply to chemicals in the following categories:

(1) any article that is formed to a specific shape or design during manufacture, that has end-use functions dependent in whole or in part on its shape or design during end use, and that does not release or otherwise result in exposure to a hazardous chemical under normal conditions of use;

(2) products intended for personal consumption by employees in the workplace;

(3) retail food sale establishments and all other retail trade establishments, exclusive of processing and repair areas;

(4) any food, food additive, color additive, drug, or cosmetic as those terms are defined in the Food and Drug Act (21 U.S.C. 201 et seq.), or distilled spirits, wines, or malt beverages as those terms are defined in the federal Alcohol Administration Act (27 U.S.C. 201 et seq.);

(5) a laboratory under the direct supervision or guidance of a technically qualified individual, provided that;

(A) labels on containers of incoming chemicals shall not be removed or defaced;

(B) material safety data sheets received shall be maintained and made accessible to employees and students;

(C) the provisions of Sections 9 and 10 of this Act are met; and

(D) the laboratory is not used primarily to produce hazardous chemicals in bulk for commercial purposes;

(6) products labeled pursuant to the federal Insecticide, Fungicide, and Rodenticide Act;

(7) hazardous waste regulated pursuant to the federal Resource Conservation and Recovery Act; and

(8) radioactive waste.

(b) No provision of this Act, except Sections 9(a) and 10, applies to a workplace where a hazardous chemical is received in a sealed package and is subsequently sold or transferred in that package if the seal remains intact while the chemical is in the workplace and if the chemical does not remain in the workplace more than five working days.

Severability

Sec. 18. The provisions of this Act are severable, and if any phrase, clause, sentence, or provision of this Act, or the application of any phrase, clause, sentence, or provision to any person, business entity, or circumstances, shall be held invalid, the remainder of this Act, and the application of such provision or provisions to any person, business entity, or circumstances other than those to which it was held invalid, shall not be affected thereby.

Fees

Sec. 19. The board may authorize the collection of fees from manufacturing and nonmanufacturing employers for the filing of workplace chemical lists required by this Act or for other community right-to-know purposes within the jurisdiction of the Texas Department of Health. The fees shall be paid annually and may not exceed $50 for each required submission.

Passed as HB1112, 69th Leg., eff. Jan. 1, 1986. Amended by HB2140, 70th Leg., 1987.

Title of Act:

An act relating to providing employees with access to information relating to hazardous chemicals to which they may be exposed during their employment, to providing hazard information to emergency service personnel and the commissioner of health, and to providing persons with a mechanism to gain access to information relating to hazardous chemicals; providing penalties. Acts 1985, 69th Leg. 1037, ch. 194.

RULES ADOPTED BY THE TEXAS BOARD OF HEALTH UNDER THE HAZARD COMMUNICATION ACT, ARTICLE, 5182b, SEC. 12.

§ 295.1. Purpose and Scope.

(a) The purpose of these rules is to provide employees and the public with access to information relating to hazardous chemicals to which they may be exposed during their employment, to provide hazard information to emergency service personnel and the Commissioner of Health, and to provide persons with a mechanism to gain access to information relating to hazardous chemicals.

(b) In order to avoid confusion among employers and the public, the Board shall implement the Hazard Communication Act, Texas Civil Statutes, Article 5182b, compatibly with the Hazard Communication Standard (OSHA Standard) of the ~~Un~~ited States Department of Labor, Occupational Safety and Health Administration, 29 CFR 1910.1200.

§ 295.2. Definitions.

In addition to the statutory definitions, the following words and terms, when used in these sections, shall have the following meanings, unless the context clearly indicates otherwise.

Act – The Hazard Communication Act, Texas Civil Statutes, Article 5182b.

Appropriate hazard warning – Any words, pictures, symbols, or combination thereof appearing on a label or other appropriate form of warning which convey the health and physical hazards of the chemical(s) in the container(s).

Board – The Texas Board of Health.

Commissioner – The Texas Commissioner of Health.

Department – The Texas Department of Health.

Health hazard – A chemical for which there is statistically significant evidence based on at least one study conducted in accordance with established scientific principles that acute or chronic health effects may occur in exposed employees. The term "health hazard" includes chemicals which are carcinogens, toxic or highly toxic agents, reproductive toxins, irritants, corrosives, sensitizers, hepatotoxins, nephrotoxins, neurotoxins, agents which act on the hematopoietic system, and agents which damage the lungs, skin, eyes, or mucous membranes.

Identity – Any chemical or common name which is indicated on the material safety data sheet (MSDS) for this chemical. The identity used shall permit cross-references to be made among the required list of hazardous chemicals, the label and the MSDS.

Label – Any written, printed, or graphic material displayed on or affixed to containers of hazardous chemicals, which includes a common name referenceable to a material safety data sheet and workplace chemical list.

Physical hazard – A chemical for which there is scientifically valid evidence that it is a combustible liquid, a compressed gas, explosive, flammable, an organic peroxide, an oxidizer, pyrophoric, unstable (reactive) or water-reactive.

Temporary workplace – A stationary workplace that is inhabited less than 20 hours per week and which contains fewer than 25 items on the workplace chemical list. A temporary workplace may be considered to be a work area of the

headquarters workplace from which employees are routinely dispatched. Temporary workplaces may include pumping stations, switching stations, electrical substations, utility structures, and the like, provided that the requirements of the Texas Hazard Communication Act, Texas Civil Statutes, Article 5182b, §§ 6, 7, 9, 10, and 15, and (sic) are met and employees have ready access to the appropriate workplace chemical lists at the headquarters and the temporary workplace.

Work area – A room or defined space in a workplace where hazardous chemicals are produced or used and where employees are present. A temporary workplace may be considered a work area.

Workplace – An establishment at one geographical location containing one or more work areas. Normally this would be a building or other structure, but it could be a complex of buildings if the work activities and hazardous chemicals within these buildings are similar.

§ 295.3 Responsibility for implementation of program.

The Commissioner's responsibilities under the Act are carried out through the Hazard Communication Branch, Division of Occupational Safety and Health, Texas Department of Health. Compliance documents and routine inquiries regarding this Act shall be addressed, until further notice by the Commissioner, to:

Hazard Communication Branch
Division of Occupational Safety and Health
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756.

§ 295.4 Labeling

(a) If the OSHA Hazard Communication Standard does not remain in effect, the chemical manufacturer, formulator, importer, or distributor of hazardous chemicals shall ensure

that each container leaving or kept in the workplace is labeled, tagged, or marked with the following information:

(1) Identity of the hazardous chemical(s);

(2) Appropriate hazard warnings; and

(3) Name and address of the chemical manufacturer, importer, or other responsible party.

(b) Employers must label new or existing stocks of hazardous chemicals with the following information, if such stocks are not already appropriately labeled:

(1) Identity of the hazardous chemical(s); and

(2) Appropriate hazard warnings.

(c) Labeling of pipelines, valves and other stationary conveyances is not required, provided that employees have ready access to documents or instruments to determine the contents of these conveyances at any time.

§ 295.5 Posting of workplace notice.

(a) Nonmanufacturing employers covered by the Act must keep posted a workplace notice specified in this rule. The wording of the required workplace notice may be changed by the Commissioner of Health as needed. The wording of the workplace notice is as follows:

NOTICE TO EMPLOYEES

THE TEXAS HAZARD COMMUNICATION ACT OF 1985, TEXAS CIVIL STATUTES, ARTICLE 5182b, REQUIRES CERTAIN EMPLOYERS TO

provide employees, local fire departments, the Texas Department of Health, and other interested persons with specific information on the hazards of chemicals in use. As required by law, your employer must provide you with certain information and training, starting January 1, 1986. A brief summary of the law follows.

1. Employers must develop a list of hazardous chemicals used or stored in the workplace, each in excess of 55

gallons or 500 pounds. Smaller quantities may be reported. The list must be sent to the Texas Department of Health at least annually, to be made available to the general public on request.

2. Employees who may be exposed to hazardous chemicals shall be informed of the exposure by the employer and shall have ready access to the workplace chemical list and to the most current material safety data sheets, which detail physical and health hazards and other pertinent information. The list must state which chemicals are present in each work area.

3. Employees shall receive training by the employer on the hazards of the chemicals and on measures they can take to protect themselves from those hazards, and shall be provided with appropriate personal protective equipment. This training shall be provided at least annually and must be reported by the nonmanufacturing employer to the Texas Department of Health within 30 days of completion.

4. Employees shall not be required to work with hazardous chemicals from unlabeled containers, except portable containers for immediate use, the contents of which are known to the user.

5. Employers must provide the names and telephone numbers of knowledgeable company representatives to the local fire department, as well as other information if the fire department requests it.

6. The following chemicals are exempted from coverage by this act: articles that do not normally release hazardous chemicals, food, cosmetics, pesticides for use (but not pesticide formulation), hazardous waste, and some other materials. Most of these are covered by other acts. Manufacturers are exempt from some provisions of the State law since they are covered under similar rules adopted by the Federal Occupational Safety and Health Administration (OSHA).

7. Employees may file complaints with the Texas Department of Health, and may not be discharged or discriminated against in any manner for the exercise of any rights provided by this act. Employees and citizens may make written requests to the Texas Department of Health to require listing of small quantities of certain highly hazardous chemicals.

EMPLOYERS MAY BE SUBJECT TO ADMINISTRATIVE PENALTIES AND CIVIL OR CRIMINAL FINES RANGING FROM $500 TO $25,000 FOR VIOLATIONS OF THIS ACT.

Further information may be obtained from:

Hazard Communication Branch
Division of Occupational Safety and Health
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756
phone: (512) 458-7410

(b) The workplace notice must measure at least 8½ by 11 inches and must be typed, typeset, or use mechanically produced lettering that is clearly legible. The letters must not be smaller than 12 characters per inch. The words 'NOTICE TO EMPLOYEES' must be in bold capital letters at least ½ inch high. Other words spelled in capital letters must be reproduced in capital letters. The notice, as specified, must be produced or obtained by each employer at his own expense until further notice by the Commissioner.

§ 295.6. Compliance deadlines.

(a) Manufacturing and nonmanufacturing employers covered by the Act or specified parts of the Act must send to the Hazard Communication Branch annually an up-to-date workplace chemical list for each of their workplaces in Texas, as specified in § 2, Declaration of Purpose, and § 6, Workplace Chemical List, of the Act. These lists shall be maintained in a public file operated by the Hazard Communication Branch.

(b) Complete workplace chemical lists must be sent to the Department annually, to be postmarked no later than as follows:

(1) manufacturers (Standard Industrial Classification Codes 20-39) – June 30, 1986, and each year thereafter:

(2) nonmanufacturers (Standard Industrial Classification Codes 46-49, 51, 75, 76, 80, 82, 84 state and local government(s) – December 31, 1986, and each year thereafter.

(c) When new chemicals are acquired during the year following the deadline, an addendum to the complete workplace chemical list or a new complete list must also be sent to the Department and must be kept by the employer for 30 years like the annual list.

§ 295.7 Training

A department booklet outlining a training program shall be available by January 1, 1987 at a reasonable price. Other informational materials may be published and sold by the Department at a reasonable price.

§ 295.8 Assessment of Administrative Penalties.

(a) Inspections may be conducted by the Commissioner or his designated representative to determine if persons are in violation of the Hazard Communication Act, Texas Civil Statutes, Article 5182b, or rules adopted by the Board of Health to enforce the Act, §§ 295.1-295.7 of this title (relating to Purpose and Scope; Definitions; Responsibility for Implementation of Program; Labelling; Posting of Workplace Notice; Compliance Deadlines; and Training). (See 11 *TexReg*. 850 and 10 *TexReg*. 4889.) Persons found to be in violation will be notified in writing of the violation.

(b) Inspections are not necessary to confirm violations in all instances. Failure to annually file with the Department the required workplace chemical list and addenda or, for non-

manufacturing employers only, to file the required notice of training will be considered violations of the Act that do not necessarily require an inspection. Other violations may be confirmed by the Department through correspondence with authorized company officials and may not warrant an inspection.

(c) Persons found to be in violation of the Act are subject to administrative penalties authorized by the Act, § 13(c). Each violation will be assessed as a separate penalty. The total penalty will be the sum of all individual violation penalties.

(d) A person notified in writing of a violation must do one of the following within 14 days: correct the violation, pay an administrative penalty, or request a hearing. A written response electing one of these actions must be received by the Chief, Hazard Communication Branch, on or before the 15th day following the receipt of the written notification of violations. A request for a hearing must specify the points of disagreement and relief sought. Hearings shall be held in accordance with §§ 1.21-1.33 of this title (relating to Formal Hearing Procedures).

(e) Penalties will be due on the 15th day following the date that a written notification of violation is received by the person, unless the Hazard Communication Branch receives an acceptable written response that each violation has been abated or that a hearing has been requested. The written response must list separately each violation and must be signed by a duly authorized company official. An inappropriate or unacceptable response will not alleviate the necessity of paying the penalty when due.

(f) Followup inspections may be made to confirm the status of abatement of violations. Any violation found on such followup inspection will be subject to an additional administrative penalty. If the first 14-day notice period has expired, that penalty will be due and a second or subsequent notice will be provided for determining second or subsequent penalty due dates.

(g) The amount of penalty per violation will be based on the seriousness of the violation.

(h) The degree of seriousness of each violation will be classified in one of three levels:

(1) A minor violation, which is a minimal threat to employees or the public and/or temporary inability to fully comply.

(2) A serious violation, which is a threat or hazard to employees or the public.

(3) A critical violation, which has caused, or is likely to cause harm to employees or the public.

(i) Penalties will be charged based on the following schedule:

Seriousness of Violation	First Occurrence 1	Second Occurrence 2	Subsequent Occurrence 3
Minor	$ 50	$100	$250
Serious*	$100	$250	$500
Critical*	$300	$400	$500

Failure to correct serious or critical violations may be considered for additional civil or criminal penalties.

(j) Individual violations may be reduced or enhanced based on consideration of the history of previous violations, good faith efforts made to correct violations promptly, and on any other considerations that justice may require. A maximum reduction or enhancement of 50% per individual violation may be considered, based on the facts presented to the Department.

(k) The following are examples of violation seriousness categories and are neither exhaustive nor controlling:

(1) Minor Violation – Level 1.

(A) Failure to post the worker notice on one of five bulletin boards.

(B) Failure to list a hazardous chemical which was not known to be a significant hazard by the employer or manufacturing employer.

(C) Failure to adequately label a hazardous material that was obtained before the Act went into effect.

(D) Failure to send an addendum to the workplace chemical list to the Texas Department of Health.

(E) Inadvertent failure of a manufacturer or distributor to provide an up-to-date material safety data sheet to a school district or other employer covered by the Act.

(2) Serious Violation – Level II.

(A) Failure to inform the local fire department of appropriate contact persons at the company.

(B) Failure to train new employees on the hazards of their jobs.

(C) Failure to provide employees a warning and information on hazardous chemicals being used in the workplace by a contractor, with employees subsequently complaining of irritation caused by vapors.

(E) Failure to train and protect office workers exposed to ammonia from a "blueline" machine.

(3) Critical Violation – Level III.

(A) Refusal to provide hazard information to an employee on request.

(B) Failure to initiate a training program.

(C) Failure to provide requested information to the local fire department.

(D) Failure to provide information on a hazardous chemical to a health professional for diagnosis or treatment of a patient.

(E) Failure to keep a file of material safety data sheets on hazardous chemicals normally present in the workplace.

§ 295.9 Fees for Workplace Chemical Lists

(a) The department shall charge a separate fee for each complete workplace chemical list or other chemical list that is required to be submitted by manufacturing and nonmanufacturing employers to the department. For the purpose of minimizing fees, consolidated filings may be made under the following conditions.

(1) Temporary workplaces, as defined in § 295.2 of this title (relating to Definitions) may be considered work areas within a headquarters workplace, but it is the responsibility of the manufacturing or nonmanufacturing employers to justify such combined reporting in writing at the time that it is submitted.

(2) If an employer has one or more workplaces, each with fewer than 25 hazardous chemicals, those multiple workplaces may be consolidated in one submission, either with one workplace having 2 or more items or with any number of workplaces, each having fewer than 25 items on the workplace chemical list. A separate cover sheet and list must be included for each workplace. If the workplace chemical list contains 25 or more items before consolidation, it may not be consolidated with other such workplaces.

(b) Each list or consolidated filing must be accompanied by a fee, except as provided in subsection (h) of this section, and must be received before the deadline given in § 295.6 of this title (relating to Compliance Deadlines). Multiple submission requiring more than one fee from one employer may be included in the same package, provided that each submission is clearly separated from the other, there is a over sheet and list for each headquarters or multiple workplace, and the total fee payment is included. Cash payments are not acceptable. Fees must be paid by check or money order to the Texas Department of Health and must be addressed to: Hazard Communication Branch, Division of Occupational Safety and Health, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756.

(c) Workplaces subject to the Texas Hazard Communication Act and the federal Superfund Amendments and Reauthorization Act of 1986 (SARA), Title III, § 311 Public Law 99-499, or other community right-to-know laws, must submit an annual workplace chemical list that adheres to the most stringent reporting requirements of any of the applicable laws and associated rules. Facilities not included in the definitions of manufacturing or non-manufacturing employer, as given in the Texas Hazard Communication Act, § 3, (concerning definitions), but which are subject to SARA, Title III, § 311, must submit to the department a list of chemicals that adheres to the reporting requirements of SARA, Title III, § 311(a)(2) (concerning contents of list). Workplaces subject only to the Texas Hazard Communication Act must adhere to the reporting requirements of that Act and these sections.

(d) Every facility covered by § 312 of SARA, Title III, § 312, must annually submit to the department a Tier I emergency and hazardous chemical inventory, which must be accompanied by a fee for each form. A Tier II inventory, which is more detailed, may be submitted instead of the Tier I inventory, as provided for in the proposed section published in the January 27, 1987 issue of the *Federal Register* (52 FedReg 2844).

(e) The department will charge $25 for each chemical list, properly consolidated filing, or Tier I or II inventory that is submitted, if a workplace has no reportable chemicals under any of the applicable state or federal requirements, no fee need be filed for that workplace. The department shall not charge a fee for any interim addendum to the list that is submitted in compliance with § 295.6(c) of this title (relating to Compliance Deadlines), provided that the employer clearly marks the addendum as such. No receipt will be provided for payment of the fee, but a cancelled check may be considered adequate proof of payment. The department may check its records for verification of payment at the request of any person.

(f) The chemical lists must be typed or mechanically produced on a form by the employer, using the most current format published by the department, which shall generally consist of the following:

(1) a cover sheet, which shall include the employer's name, address, and telephone number; the workplace name, address, and telephone number; the facility representative's name and telephone number; the date; the total fee payment that is enclosed; the total number of hazardous chemicals in the list; an indication of the type of chemical list, such as a state-required workplace chemical list as defined in the Texas Hazard Communication Act, § 6, § 295.2 of this title (relating to Definitions), and § 295.6 of this title (relating to Compliance Deadlines), or a SARA, Title III chemical list (as defined in SARA, Title III, § 311), or other community right-to-know chemical list; and the chemical nomenclature system (Chemical Abstracts Service, International Union of Pure and Applied Chemistry or other) that is generally used in the list;

(2) the chemical list itself which shall consist of the following.

(A) If the state-required workplace chemical list is submitted, it shall contain the common or chemical name of each hazardous material (one per row); the chemical names of all hazardous ingredients in the material; the work areas where the material is used or stored; and (optionally) the hazards and typical quantity of each material.

(B) If the chemical list required under SARA, Title III, § 311, is submitted, it shall contain a list of the hazardous chemicals for which a material safety data sheet is required under the Occupational Safety and Health (OSHA) Act of 1970 (Public Law 91-596) and the OSHA Hazard Communication Standard. The list shall consist of the chemical or the common name of each such chemical as provided on the material safety data sheet; any hazardous component of each such chemical as provided on the material safety data sheet; the health and physical hazards of the material; and

(optionally) the work area(s) and the typical quantity of each material.

(g) Submission of material safety data sheets (MSDSs) in lieu of the required chemical lists will not be acceptable.

(h) The department may specify methods for the filing of chemical lists on media that are compatible with computing equipment and software used by the department. Employers must then follow such specifications when submitting lists. If the submission by alternate media is acceptable to the department, the fee shall be sent to the department with the list. In the alternative, if the list is submitted by means of communications equipment and is acceptable to the department the fee shall be sent to the department by United States mail within five working days after the submission.

(i) The required chemical list form or format must be made available by the department at the request of employers and manufacturing employers, and may be copied for use or simulated by the employer.

(j) The department may reject chemical lists that do not conform to specifications of which are illegible or unusable by automated equipment. Failure to submit an acceptable workplace chemical list and fee payment by the compliance deadline, given in § 295.6 of this title (relating to Compliance Deadlines), shall be considered a serious violation, subject to the administrative penalties and procedures described in § 295.8 of this title (relating to Assessment of Administrative Penalties).

(k) The department may refund an overpayment to an employer provided that:

(1) the employer provides, in writing, proof of payment, the date(s) on which the workplace chemical list and fees were sent to or received by the department, the circumstances that caused the overpayment, and the reasons why it would have considered an overpayment under the Act and rules in force at the time of the original filing;

(2) the employer requests the refund in writing within one year of the date on which the workplace chemical list and fee were received by the department; and

(3) the employer provides, at the time of the request, a handling fee of $10 per refund, payable by check or money order to the Texas Department of Health.

IMPORTANT NOTE ON RIGHT-TO-KNOW LAWS

Two important federal laws now overlap the Texas-Hazard Communication Act (Texas HCA). They are the "OSHA Hazard Communication Standard" (OSHA HCS or 29 CFR 1910.1200) and the "Superfund Amendments and Reauthorization Act, Title III," known as "SARA, Title III" or the "Emergency Preparedness and Community Right-to-Know Act." Other state and local laws may also affect employers.

The OSHA HCS requires most private employers to provide hazard communication training, information, and protective equipment to their employees. The scope of the OSHA HCS was expanded to the nonmanufacturing sector so that employers must be in compliance by may 23, 1988. OSHA's expanded jurisdiction on "worker right-to-know" pre-empts or supercedes the Texas HCA as it pertains to worker training in private workplaces. See OSHA's final rule on Hazard Communication in the *Federal Register*, August 24, 1987. The Texas Department of Health still has jurisdiction over worker training in all state and local tax-supported institutions, including public schools and universities.

The community right-to-know jurisdiction of the Texas Department of Health has been increased by SARA, Title III and the Legislature. Employers must annually report their chemical inventory and pay a $25 fee to the Department. Employers not previously covered by the Texas HCA will be subject to SARA, Title III, starting May 23, 1988 (the initial deadline for reporting is August 23, 1988). Manufacturers and many nonmanufacturers are already subject to the state's annual reporting requirements. Reports must also be filed

with the local fire department and the "Local Emergency Planning Committee" in each county. Reporting forms and a written guide to compliance are available from the Department on request.

State laws and city ordinances that require reporting of hazardous chemicals continue to be enforced (SARA, Title III does not pre-empt them). However, these laws may be amended to accommodate the federal reporting requirements.

Agricultural employers should be aware of the Texas Agricultural Hazard Communication Act of 1987 (Texas Agricultural Code Annotated, Chap. 125, Vernon's Supp. 1988). This law requires that certain information be given to farm workers and to communities affected by agricultural chemicals. Questions may be directed to the Texas Department of Agriculture, Right-to-Know Program, P.O. Box 12847, Austin, Texas 78711, phone (512) 463-7547.

Further information on the Texas HCA and SARA, Title III may be obtained from:

Hazard Communication Branch
Division of Occupational Safety and Health
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756
phone: (512) 458-7410